Indigenous Rights to Development, Socio-Economic Rights, and Rights for Groups with Vulnerabilities: Articles 20 – 22, 24 and 44.

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Article 20

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

Article 21

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.

2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

Article 22

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.

2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

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Article 24

1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.

2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

Article 44

All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

I. Introduction

This chapter is focused on the challenges and implications of Articles 20(1), 21, 22, 24, and 44 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP; the Declaration). These provisions are centered on: the economic, social, and cultural (ESC) rights of indigenous peoples, (with a particular focus on the right to health); their right to development; the rights of those indigenous individuals and groups who are particularly vulnerable, including women and children, and again with a particular focus on women's rights to be free from violence. The provisions highlight the evolving place of indigenous rights within the overall framework of international law and international human rights.

The chapter begins, in Part IA, by providing a short summary of the content of the principles. Part IB identifies the relevance and importance of the Articles, drawing attention to the legal and policy framework within which their legal and broader political meaning must be understood. This context includes the longstanding issues of poverty and marginalization that remain entrenched in many indigenous communities, and the emerging architecture of international poverty law that is recently developing through more robust understandings of the intersections between economic, social and cultural rights, the right to development, and the rights of specific vulnerable groups. This architecture includes relevant provisions of the

Sustainable Development Goals[1] (SDGs; previously known as the Millennium Development Goals, or MDGs[2]) which were adopted by the UN General Assembly in September 2015. Part II then analyses the pre-existing legal standards on economic social and cultural rights, the right to development, and rights for vulnerable groups. We then turn, in Part III, to the drafting history of the UNDRIP provisions discussed here, in order to illuminate better the meaning of the final provisions. Part IV returns to the final text of the provisions, and, proceeding issue by issue, outlines their position within, or contribution to, the legal landscape on indigenous and human rights. Finally, Part V concludes the chapter's analysis.

I A – The Provisions in Context

Several main strands and standards can be drawn from the provisions above. These include first, the right to development of indigenous peoples. This is explicitly included in Article 20 and also implicit in Article 21's 'improvement' of economic and social standards. The second main strand is the socio-economic rights of indigenous individuals and peoples, including in particular health, but also rights to education and housing, training and social security. The third main strand is that of the protection of individuals and groups who are of particular vulnerability: elders and the elderly, women, children and youth, and those with disabilities.

Article 20 begins by articulating indigenous peoples´ right 'to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities'. This Article frames issues related to economic, social and cultural rights within an underlying framework of indigenous rights to self-determination and autonomy, as the context from which everything else flows, and within which Article 20´s approach to ESC rights is embedded. This is underlined for example by Article 20´s emphasis on a right to be 'secure in the enjoyment of their own means of subsistence and development'.

[1]UNGA Transforming our World: The 2030 Agenda for Sustainable Development, Resolution adopted by the General Assembly on 25 September 2015 A/Res/70/1 (21 October 2015).
[2] UNGA, United Nations millennium Declaration 8 September 2000 A/Res/55/2 18 September 2000.

Ongoing, often divisive and polarising debates as to the meaning and implications of "development" during the process which led to the Declaration´s adoption explain in part why this concept is in fact never defined explicitly in the text.[3] For that reason, Articles 21 – 24, with their emphasis on indigenous driven improvement of social and economic conditions and control over the processes of their development, stand in for an explicit, overall right to development. UNDRIP´s approach thus implicitly grounds the right to development of indigenous peoples within the context of the exercise of indigenous peoples´ rights to self-determination and autonomy. This is reinforced in Articles 3 and 4 of the Declaration, and further reflected in other key Articles with a related emphasis such as Arts. 18, 31, 32, 34, and corollary concerns as to processes of development in Articles 39 and 41. As a central, guiding thread of 'fundamental importance', it is also given prominence in the Preamble.[4]

This overall emphasis in the Preamble and in the Declaration as a whole on self-determination, as reflected in Articles 3, 4, 5 and 23, must also shape our understanding of its provisions relating to the impact of development policies and practices on indigenous peoples. Article 3 clearly suggests that indigenous peoples´ exercise of their rights to self-determination lays the basis for, or is a precondition necessary in order to ensure, their free pursuit of economic, social, and cultural development. Articles 4 and 5 further underline this approach with their emphasis on indigenous peoples´ rights to 'autonomy or self-government in matters relating to their local or internal affairs' (Article 4), and to 'maintain and strengthen their distinct political, legal, economic, social and cultural institutions' (Article 5). All of this is explicitly echoed in Article 20´s introductory sentence: 'Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions', which, as drafted, serves as a predicate or prerequisite for its second clause: 'to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities'. Article 23 of the Declaration reinforces this interpretation: 'Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development'. Articles 20 and 23 together suggest that the exercise of indigenous peoples´ rights to self-determination through autonomous systems of self-governance is a necessary basis for, or at minimum intimately related to, their capacity to enjoy the benefits of their rights to subsistence and development and to engage in their traditional and other economic activities.

[3] See Part III, below.
[4] Preamble UNDRIP Para 16.

Art. 21(1) situates Article 20´s emphasis on economic, social and cultural issues, specified in Article 21 in terms of a right to the 'improvement' of conditions and rights related to 'education, employment, vocational training and retraining, housing, sanitation, health and social security', within the overall framework of the right of indigenous peoples to non-discrimination.[5] Article 21(2) focuses on state duties, in terms of obligations to take 'effective measures' 'and, where appropriate, *special measures* to ensure continued improvement'. This is the only Article in which special measures are explicitly included in the UNDRIP.[6] Article 21 also stresses that states should undertake such measures with '(p)articular attention…to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities'. Gender equality is specifically the emphasis of Article 44.

Article 24´s approach to issues involving indigenous peoples and health rights embeds in Article 20 deeper notions as to self-determination and autonomy. Just as Article 20 insists on a relationship between violations of economic and social rights related to 'subsistence and development' and violations of rights to autonomy, Article 24(1) begins with an overall statement of indigenous peoples´ rights to traditional medicines and traditional health practices 'including the conservation of their vital medicinal plants, animals and minerals', and then of rights of access 'without any discrimination, to all social and health services'. 24(2) then situates the right to health within the overall context framed by Article 24(1), with its two interrelated components: the right to traditional practices, and the right to all social and health services without discrimination. This construction strongly suggests that UNDRIP´s approach to health rights, (and economic and social rights more generally), is that the best way to guarantee them is within the framework of indigenous systems of self-governance and autonomy which respect internationally recognised human rights standards.
It is this broader context within which the provisions analysed in this chapter must be read.

I B Relevance and Importance of the Issue Area

[5] This echoes UNDRIP Article 2´s emphasis on this entitlement, which is also referenced explicitly in Articles 8, 9, and 13-17 and 24).
[6] Special measures are also addressed further by Kirsty Gover, Ch 7 of this volume.

The provisions discussed here raise issues of the relationship between indigenous rights and recent advances as to the recognition of poverty as a violation of human rights, and must also be understood in the context of how issues of poverty and development have been approached by specialised bodies within the UN system, including international development organisations, and in settings such as the Inter-American Court of Human Rights (IACtHR), developments discussed in the next section. Developments as to the recognition and understanding of indigenous rights in the Americas are of particular interest because of the large numbers and high concentration of indigenous peoples in that region (particularly in Latin America), and the recent adoption in June 2016 of the OAS American Declaration on the Rights of Indigenous Peoples[7] which draws heavily on UNDRIP and on the IACtHRs case law.

These developments are especially relevant to the context of indigenous peoples because of the very high incidence of poverty experienced by indigenous peoples world-wide, including the most extreme forms of poverty, and because, accordingly, ESC rights are central to the UNDRIP.

The concentration and persistence of poverty and inequality of indigenous peoples on a global scale has been extensively documented.[8] Troublingly, studies reveal 'little to no improvement in poverty rates over time.'[9] The World Bank´s overall conclusion from its many reports[10] is that 10 percent of the world's poor are indigenous, though indigenous peoples account for only 4 percent of the total world population, that they remain among the poorest of the poor, and are the most resistant to moves out of poverty.[11]

[7] OAS American Declaration on the Rights of Indigenous Peoples, OEA/Ser.P AG/doc.5537/16, 8 June 2016.
[8] World Bank 'Still Among the Poorest of the Poor: Indigenous Peoples Country Brief' World Bank Policy Brief 64760 (World Bank, 2011); and Hall and Patrinos (eds) 'Indigenous Peoples, Poverty, and Development: A Seven-Country Study of Indigenous Peoples' (World Bank 2011).
[9] Hall and Patrinos 'Introduction' in Gillette H. Hall and Harry Anthony Patrinos (eds), *Indigenous peoples, poverty, and development* (Cambridge University Press 2012) 1.
[10] Collected at http://www.worldbank.org/en/topic/indigenouspeoples/research/all (accessed Nov 22 2016).
[11] World Bank 'Still Among the Poorest' (n 8), See also Hall and Patrinos (eds) *Indigenous Peoples, Poverty and Human Development in Latin America* (Palgrave 2006).

Indigenous peoples suffer from significantly lower life expectancies, have lower educational attainment, and experience high rates of criminalization.[12] Evidence of social harm and dysfunction can be found in the high levels of substance abuse and domestic violence experienced in indigenous communities.[13] The UN Permanent Forum on Indigenous Issues (UNPFII) has noted that:

> Indigenous peoples face systemic discrimination and exclusion from political and economic power; they continue to be over-represented among the poorest, the illiterate, the destitute; they are displaced by wars and environmental disasters; … indigenous peoples are dispossessed of their ancestral lands and deprived of their resources for survival, both physical and cultural; they are even robbed of their very right to life.[14]

The indigenous peoples of the world continue to be exposed to a high level of preventable deaths – due to hunger and illness, for example – attributable to poverty, as the result of the structural injustices in the global international order.[15] These findings clearly heighten the importance of the provisions in Articles 20, 21 and 24 of UNDRIP regarding the economic, social, and cultural rights of indigenous peoples in the context of persistent conditions of poverty and inequality.

There is heartening evidence, however, from states which have undertaken sweeping constitutional and legislative reforms in favour of indigenous peoples – such as Bolivia and Ecuador. Since 2009, 'special measures' taken in these states have seen significant overall declines in longstanding and ingrained poverty rates.[16] Such examples reinforce the crucial nature of the UNDRIP provisions discussed in this chapter, and their potential as real drivers of change for indigenous individuals and peoples.

[12] International Law Association, The Hague Conference (2010) 'Rights of Indigenous Peoples' Interim Report, (2010) 28.
[13] Ibid.
[14] UN Department of Economic and Social Affairs, Secretariat of the Permanent Forum on Indigenous Issues, *State of the World's Indigenous Peoples* (UN, New York, 2009) UN ST/ESA/328, 1.
[15] See Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (Polity, 2002).
[16] See Pérez-Bustillo 'UNDRIP and Substantive Aspects of the "Right to Development" and the "Right to a Dignified Life" in the Context of Indigenous Peoples: Hegemonic and Counter-Hegemonic Dimensions' (2014) 1 QMHRR 42, 58- 59.

Article 43 of the Declaration explicitly affirms that the rights recognized in UNDRIP reflect 'minimum standards' related to the 'survival, dignity and well-being' of the indigenous peoples of the world. This conceptualization of the Declaration as establishing a set of minimums, which is crucial, is discussed further below. But the decision to include words such as 'survival, dignity and well-being' has additional importance for two reasons. First, in effect Article 43 defines these as three overall imperatives of the Declaration, which should shape the landscape within which its more specific requirements must be understood.[17] Second, Articles 43, 21 and 22 must be also assessed at the level of their implementation in terms of their efficacy as measures for the prevention of genocide, given the catastrophic histories of many indigenous peoples and the infinite variety of calculated destructive policies that have been wielded against them.[18]

All three of Article 43's concepts of survival, dignity and well-being also reflect recurrent themes among social movements, advocates, and scholars who specialise in issues related to poverty. The concepts underlie the relationship between poverty, inequality, and human rights in general, and broader issues as to the right to development and the pursuit of global justice, and the concept of development ethics.[19] They thus implicate some of the deepest and most difficult issues in international law and policy.

IC An Emerging Architecture of International Poverty Law

The provisions addressed here on the right to development, particular vulnerabilities of indigenous peoples including women, children and the elderly, and the economic and social rights of indigenous peoples, should be understood in reference to an emerging international architecture of poverty law.

[17] See Hohmann, Chapter 6 of this volume.
[18] Ibid.
[19] See for example van Genugten and Pérez-Bustillo 'The Emerging International Architecture of Indigenous Rights: The Interaction between Global, Regional and National dimensions' (2004) 11 *International Journal of Minority and Group Rights* 379; Sen, *Development as Freedom* (OUP, 1999); Pogge 2002 (n 15); Follesdal and Pogge, (eds) *Real World Justice: Grounds, Principles, Human Rights and Social Institutions* (Springer, 2006); Gauri and Brinks, (eds) *Courting Social Justice* (CUP, 2007); Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (CUP, 2007).

UNDRIP´s approach to ESC rights in the context of indigenous peoples should thus also be understood in relation to broader efforts within the UN system to rectify the historic imbalance between the recognition, monitoring and enforcement of civil and political rights on the one hand and of ESC rights on the other. This includes the recent entry into force of the Optional Protocol to receive and consider individual and group communications alleging violations of the Covenant on Economic, Social and Cultural Rights (ICESCR),[20] the adoption of the UN Guiding Principles on Extreme Poverty and Human Rights,[21] and that of the Sustainable Development Goals (SGDs) in 2015.[22]

Indigenous peoples are specifically mentioned in the SDGs, referring respectively to issues related to hunger and health, [23] and also fall squarely within the SDGs' reiterated references to groups which have heightened vulnerabilities or which are in 'vulnerable situations.'[24] There is also an analogous reference to 'marginalized communities'[25]. Further examples include the SDG's recognition of a need to protect forms of 'traditional knowledge'[26], and the need to 'empower and promote the social, economic, and political inclusion of all' (irrespective of race, ethnicity, etc.)[27]. Section 4.7, within the context of issues related to health rights, specifically refers to the need to apply a human rights framework to the interpretation and implementation of the SDGs. Human rights issues are also alluded to more generally in SDG Goal 16's references to the promotion of the rule of law and of principles of non-discrimination.

The Guiding Principles on Extreme Poverty and Human Rights, meanwhile, 'are premised on the understanding that eradicating extreme poverty is *not only a moral duty but also a legal*

[20] Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 10 December 2008 in force 5 May 2013); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 3.
[21] UN OHCHR 'Guiding Principles on Extreme Poverty and Human Rights, Resolution Adopted by the Human Rights Council, 18 Oct 2012, A/HRC/RES/21/11 .
[22] (n 1) .
[23] Ibid section 2.3 and 4.5 respectively.
[24] Ibid sections 1.4, 1.5, 2.1, and 6.2 for eg.
[25] Ibid section 13b (within the context of issues related to the mitigation of the impacts of climate change).
[26] Ibid Section 2.5 (within the context of issues as to the protection of the genetic diversity of seeds, plants, and fauna).
[27] Ibid Section 10.2.

obligation under existing international human rights law'[28], and grounded in recognition of the fundamental right to 'live in freedom and dignity, free from poverty and despair'[29].

The Guiding Principles emphasise the importance of fostering the rights of participation of the poor in a manner that is parallel to and convergent with the emphasis in UNDRIP on the self-determination and autonomy of indigenous peoples, as noted in the UN General Assembly Resolution on Extreme Poverty and Human Rights adopted in December 2012, which stresses the need for participation by the poorest in the decision making processes in which they live, with particular emphasis on the planning and implementation of those polices that will affect them, so as to enable them 'to become genuine partners in development.'[30]

The UN Office for the High Commissioner of Human Rights (OHCHR) has stressed the relationship between the Guiding Principles on Extreme Poverty and Human Rights, and fundamental notions of human dignity, equality and non-discrimination which also converge with UNDRIP, in its interpretation of the Guiding Principles.[31]

The UN Guiding Principles on Extreme Poverty and Human Rights are not the only relevant statements from UN bodies on poverty and human rights. As the UN Committee on Economic, Social and Cultural Rights (CESCR) noted in May 2001:

> The rights to work, an adequate standard of living, housing, food, health and education, which lie at the heart of the Covenant, have a direct and immediate bearing upon the eradication of poverty …. In the light of experience gained over many years, including the examination of numerous States parties' reports, the Committee holds the firm view that poverty constitutes a denial of human rights.[32]

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[28] UN OHCHR Report on the Guiding Principles on Extreme Poverty and Human Rights, available at http://www.ohchr.org/Documents/Publications/OHCHR_ExtremePovertyandHumanRights_EN.pdf (accessed Jan 17 2017), 2 (emphasis added).
[29] UN World Summit Outcome 2005, Resolution adopted by the GA, (24 Oct 2005) A/Res/60/1 para 143.
[30] Resolution Adopted by the GA on 20 Dec 2012, Human Rights and Extreme Poverty, 13 march 2013, A/Res 67/164), para 2.
[31] Report of the OHCHR on the Guiding Principles on Extreme Poverty and Human Rights (n 28).
[32] UNCESCR, *Substantive Issues Arising in the Implementation of The International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights:*

From this perspective, the emphasis on ESC rights overall in UNDRIP, as to the improvement of economic and social conditions of indigenous peoples in the Articles discussed in this chapter, situates UNDRIP within the broader emerging framework of international poverty law, along with the May 2001 CESCR Statement, the ICESCR Optional Protocol, the UN Guiding Principles on Extreme Poverty and Human Rights, and the SDGs.

1D Pre-Existing Standards on the Right to Development, Economic, Social and Cultural Rights, and the Rights of Specific Vulnerable Groups

i Right to Development

Development in International law: Underlying Principles and Development Policy Framework

UNDRIP was drafted, debated and ultimately approved within a historical context shaped by the centrality of universal aspirations for economic and social development which have been key objectives of the UN system since its origins. Yet, at the same time, 'the history of planned development is replete with the imposition of projects resulting in the destruction or loss of indigenous peoples' lands and resources, as well as their political, economic, and sociocultural systems.'[33] This points to the multiple meanings of development in international law, all of which impact on the understanding of the right to development in the UNDRIP. Different bodies of law and policy in this area are of relevance for understanding the UNDRIP provisions discussed in this chapter. These include development as a principle of international law as expressed in the UN Charter; the right to development as a human right given content in international law; and the development policies and practices of major agencies such as the World Bank and the UN Development Programme (UNDP).

Statement Adopted by the Committee on Economic, Social and Cultural Rights on 3 May 2001, E/C.12/2001/10 (10 May 2001) para 1.

[33] Masaki, 'Recognition or Misrecognition? Pitfalls of Indigenous Peoples' Free, Prior, and Informed Consent (FPIC) in Hickey and Mitlin (eds) *Rights-Based Approaches to Development: Exploring the Potential and Pitfalls* (2009, Kumarian Press) 70.

The UN Charter contains references in the Preamble to the promotion of 'social progress and better standards of life',[34] and Articles related to or which explicitly highlight the concept of development. These include UN Charter Article 1(3)'s purpose '[t]o achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character', Article 55's 'the United Nations shall promote: higher standards of living, full employment, and conditions of economic and social progress and development; solutions of international economic, social, health, and related problems', and Article 56's 'All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55 of the Charter'.

Both the Preamble and UN Charter Article 55 emphasize the inter-related character within the UN´s overall mission of promoting social progress, better standards of life, and development within the framework of a commitment to human rights and fundamental freedoms, without discrimination. Key expressions of this foundational, intertwined approach to issues of development and human rights are reflected in turn in the Preamble and Articles 22-28 of the Universal Declaration of Human Rights (UDHR).[35] Article 28 of the UDHR situates this framework within the context of the international system as such: 'Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.'[36]

The focus on development in the UN Charter is important, as is Article 28 UDHR, as it points to the fact that development is not only the duty of individual states, but an obligation on the international community as a whole. This duty thus extends to action by – and coordination among – all states, the International Labor Organisation (ILO), the UNDP, UN human rights monitoring bodies, the International Monetary Fund (IMF), the World Bank, and relevant regional agencies such as the Organisation of American States (OAS).

The references to development in the UN Charter, and even in Article 28 of the UDHR are not necessarily to a *right* to development, either for individual persons or for peoples. As underlying imperatives or policy commitments, rights and development have crucial

[34] UN Charter, Signed 26 June 1945, San Francisco, Entered into force 24 October 1945, Preamble.
[35] Universal Declaration of Human Rights, Proclaimed by the UNGA 10 December 1948, Paris GA Res 217/A.
[36] Ibid, Article 28.

differences in their aims, their methods, and their underlying values.[37] Nevertheless, a *right* to development has been advanced in international law, which in turn provides one of the key conceptual foundations for the Sustainable Development Goals, discussed above.

The Right to Development as a Human and Peoples Right

A right to development as a human right finds its genesis in Human Rights Commission Resolution 5 (XXXV) of 1979.[38] Subsequently, General Assembly Resolution 36/133 of December 1981 phrased development as an 'inalienable human right.'[39] These resolutions were explicitly reinforced in the 1986 UN Declaration on the Right to Development, where development is a right of both individuals and peoples.[40] Article 1 states that:

> The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.

The African Charter on Human and Peoples Rights[41] also includes a right to development, as a peoples' right in Article 22:

> (1) All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
>
> (2) States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

[37] See Archer, 'Linking Rights and Development: Some Critical Challenges' in Hickey and Mitlin (eds) *Rights-Based Approaches to Development: Exploring the Potential and Pitfalls* (2009, Kumarian Press). See also Munro, 'The "Human Rights-Based Approach to Programming": A Contradiction in Terms?' in ibid.
[38] HRC Res 5 (XXXV) 2 March 1979.
[39] UNGA Res 36/133 14 Dec 1981.
[40] UNGA Res 41/128 4 Dec 1986.
[41] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 Oct 1986) 1520 UNTS 217.

In 1990, the African Charter on Popular Participation in Development and Transformation was signed with an important emphasis on human centred, popularly supported and driven, development.[42]

Despite these statements, the right to development has not been embraced by all states, as was evident even in the drafting of the UNDRIP,[43] and its status within international law remains contested.[44]

Nevertheless, both the Declaration on the Right to Development and the African Charter on Human and Peoples' Rights explicitly recognise the social and cultural aspects of development, in addition to its economic elements. The Committee on Economic, Social and Cultural Rights has pointed out the 'complementarity' between the ICESCR and the Declaration on the Right to Development, which is evident in:

> the provisions of article 8, paragraph 1, of the Declaration on the Right to Development and those of the Covenant relating to, for example, ensuring the empowerment and active participation of women, disadvantaged and marginalized individuals and groups; employment; basic resources and fair distribution of income; eradication of poverty; the provision of an adequate standard of living, including food and housing; health services; education; and enjoyment of culture.[45]

The Declaration on the Right to Development's phrasing can be used to respond to narrow conceptions of economic development which result in environmental and social degradation. This is reinforced by its Article 2(2) which references respect for human rights and fundamental freedoms in the development process.[46]

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[42] African Charter for Popular Participation in Development and Transformation UN Doc A/45/427 (1990).
[43] See the discussion below in Part II.
[44] See for example Tomuschat, *Human Rights: Between Realism and Idealism* (2nd ed) (OUP 2008) 55.
[45] CESCR Statement on the 25h Anniversary of the Declaration of the Right to Development, E/C.12/2011/2 12 July 2011 para 5.
[46] Art 2(2) reads: 'All human beings have a responsibility for development, individually and collectively, taking into account the need for full respect for their human rights and fundamental freedoms as well as their duties to the community, which alone can ensure the free and complete fulfilment of the human being, and they should therefore promote and protect an appropriate political, social and economic order for development.'

Indigenous peoples have been generally absent, until recently, as recognized actors and as explicit subjects of internationally recognized rights during most of the relevant history of development policies within the UN system, and their equivalents within the member states where they have the most significant presence.[47] In addition, their non-recognition as peoples in international law would have meant, at that time of the adoption of the Declaration on the Right to Development, that any rights under it would apply to them as individuals only.

Significant, then, in their dealing explicitly with Indigenous Populations' and Peoples' right to development are the ILO's *Indigenous and Tribal Populations Convention, 1957 (No. 107)* (ILO 107)[48] and *Indigenous and Tribal Peoples Convention, 1989 (No 169)* (ILO 169).[49]

Article 6 ILO 107 specifies that:

> The improvement of the conditions of life and work and level of education of the populations concerned shall be given high priority in plans for the over-all economic development of areas inhabited by these populations. Special projects for economic development in the areas in question shall also be designed as to promote such improvement.

Far from a right to development itself, however, this provision provided guidance for appropriate State priorities in *their* development aims of indigenous lands and territories. Further references to economic and social development in ILO 107 are also premised on an understanding of development as imposed on indigenous people and peoples from outside. For example, Article 13(1) allowed customary indigenous land transfer practices, 'in so far as they … do not hinder [the indigenous people's] economic and social development.' Article 14(b) envisaged indigenous lands as ripe for the promotion of development.[50]

[47] ILA Interim Report, (n 12) 36.
[48] ILO Indigenous and Tribal Populations Convention, 1957 (No. 107) Entered into force 2 June 1959.
[49] ILO Indigenous and Tribal Peoples Convention, 1989 (No 169) Entered into force 5 September 1991.
[50] ILO 107 Article 14 reads: 'National agrarian programmes shall secure to the populations concerned treatment equivalent to that accorded to other sections of the national community with regard to--
(a) the provision of more land for these populations when they have not the area necessary for providing the essentials of a normal existence, or for any possible increase in their numbers;
(b) the provision of the means required to promote the development of the lands which these populations already possess.'

Accordingly, ILO 169 is significant in its recognition of the right to development of indigenous peoples. Article 6(1)(c) states that:

> 1. In applying the provisions of this Convention, governments shall: …
> (c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.

Article 7 gives indigenous peoples the right to decide their own development priorities in the following terms:

> 1. The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.
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> 2. The improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and co-operation, shall be a matter of priority in plans for the overall economic development of areas they inhabit. Special projects for development of the areas in question shall also be so designed as to promote such improvement.
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> 3. Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.

Both Articles 6 and 7 are an important recognition of the need for self-determined development, and the links between development and economic, social and cultural

conditions of indigenous individuals and peoples. Article 7(4) also specifically provides for the protection of indigenous environments and territories.

International and Regional Development Agencies and Development Policy

The World Bank´s first policies regarding tribal peoples were adopted in 1981 and 1982, and since 1991 have required borrowers to mitigate the impacts of development on indigenous peoples.[51] Operational Policy 4.10 (OP 4.10), most recently revised in 2013,[52] requires the Bank to identify if there are indigenous people who are likely to be affected, the borrower to conduct a social assessment of the impacts of the project, and for both to engage in a process of free, prior and informed consultation with the project affected peoples.[53] The Policy states that the Bank will lend only where such consultation results in 'broad community support to the project by the affected indigenous peoples.'[54] Adverse impacts should be, in the first instance, avoided, and in the second, mitigated.[55] The Policy further states that 'Bank-financed projects are also designed to ensure that the Indigenous Peoples receive social and economic benefits that are culturally appropriate and gender and intergenerationally inclusive.'[56] OP 4.10 para 22 states that the Bank will also support projects that seek to provide development *for* indigenous peoples.[57] Although the Bank's policies are intended to avoid and mitigate harms to indigenous peoples, as Bantekas and Oette note, the overall protection offered by the Bank is limited, and accordingly the likely outcome is that the 'cycle of poverty and underdevelopment will be perpetuated.'[58]

Issues regarding the relationship between development, human rights, and the rights of indigenous peoples which are raised by Articles 20, 21, 22, and 44 of UNDRIP have also been addressed within the context of broader debates regarding the UN´s Millennium Development Goals (MDGs), the predecessors of the current SDGs, which coincided with the

[51] See generally Davis, *The World Bank and Indigenous Peoples* World Bank Doc 27205 (World Bank, 1993).
[52] World Bank Operation Policy 4.10 on Indigenous Peoples (revised April 2013) available at https://policies.worldbank.org/sites/ppf3/PPFDocuments/090224b0822f89d5.pdf (accessed Nov 22 2016).
[53] Ibid.
[54] Ibid. para 1.
[55] Ibid.
[56] Ibid.
[57] Ibid para 22.
[58] Bantekas and Oette, International Human Rights law and practice (CUP 2013) 451.

UN´s proclamation of the first International Decade of the World´s Indigenous People (1994-2004).[59]

Three of the five main objectives of the Second International Decade of the World's Indigenous People (2005-2014)[60] refer directly to development issues for indigenous peoples. These are Objective iii, which promotes '[r]edefining development policies that depart from a vision of equity and that are culturally appropriate, including respect for the cultural and linguistic diversity of indigenous peoples'; Objective iv, which aims at '[a]dopting targeted policies, programmes, projects and budgets for the development of indigenous peoples, including concrete benchmarks, and particular emphasis on indigenous women, children and youth'; and Objective v, which aims towards '[d]eveloping strong monitoring mechanisms and enhancing accountability at the international, regional and particularly the national level, regarding the implementation of legal, policy and operational frameworks for the protection of indigenous peoples and the improvement of their lives.'[61]

The MDG´s targeted monitoring-based approach to global poverty reduction efforts is clearly alluded to in the Decade´s objectives centred around the needs and demands of indigenous peoples, but it has been widely noted that the process to develop the MDGs, their content, and implementation failed to reflect and incorporate the perspectives and concerns of indigenous peoples. For instance, the UN's Permanent Forum on Indigenous Issues (UNPFII) Inter-Agency Support Group expressed concern in 2005 that the exclusion of indigenous people from the formulation of the MDGs:

> may lead to the exclusion of indigenous peoples from sharing the benefits of the MDGs and may in fact adversely impact their communities by deepening the discrimination faced by indigenous peoples and accelerating the exploitative use of their land and resources in the name of progress and economic development.[62]

[59] UNGA International Decade of the World's Indigenous People A/Res/48/163 21 December 1993.
[60] UNGA Second International Decade of the World's Indigenous People A/Res/59/174 24 Feb 2005.
[61] UNGA, 'Draft Programme of Action for the Second International Decade of the World's Indigenous People' (18 August 2005) A/60/270.
[62] UNPFII Report of the Inter-Agency Support Group on Ingenuous peoples issues on its 2004 Session E/c.19/2005/2, 14 Feb 2005, Annex III Technical Position Paper Prepared by the Inter-Agency Support Group on Indigenous Issues on the Millennium Development Goads and Indigenous Peoples, para 3.

One explanation for the failure of the MDG process to adequately address issues involving indigenous peoples may be that UNDRIP had not yet been adopted when the MDG process was first conceived, and did not become the point of reference for indigenous rights issues until almost halfway along the MDGs´ trajectory towards 2015. However, even post UNDRIP, indigenous concerns are not well met in the MDGs, as recently expressed by the UNPFII:

> Despite many of the successes of the MDGs, they have not managed to fully address the values and principles outlined in the Millennium Declaration, particularly in relation to human rights and equality. Addressing inequalities in the post-2015 development agenda means looking at both equality of opportunities and outcomes (or lack thereof), and entrenched structural factors, that perpetuate various forms of inequalities such as discrimination based on ethnicity, gender, age, location, etc.[63]

As for explicit attention to indigenous peoples and the right to development in general international human rights instruments, as early as 1997, the UN Committee on the Elimination of Racial Discrimination (CERD) had produced a General Recommendation on the Rights of Indigenous Peoples in which it noted that indigenous peoples must be provided with 'conditions allowing for a sustainable economic and social development compatible with their cultural characteristics.'[64]

Sustainable Development

As set out in the Brundtland Report of 1987, sustainable development is defined as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs.'[65] The concept seeks to capture the problems of an economic development paradigm, based on the recognition that environmental degradation

[63] UN Division for Social Policy and Development, Indigenous Peoples, 'Post-2015 Agenda' available at https://www.un.org/development/desa/indigenouspeoples/focus-areas/post-2015-agenda.html (accessed 18 Jan 2017).

[64] CERD General Recommendation No. 23: Indigenous Peoples: 18/08/97 A/52/18 Annex V, para 4 (c).

[65] World Commission on Environment and Development, *Our Common Future* (Oxford University Press, 1987) IV 3, para 27 (Brundtland Report).

and the persistence of global poverty are inherently issues of development, and provide solutions through an alternative development approach[66].

The 1992 Rio Declaration on Environment and Development[67] and 1992's Agenda 21[68] both provide principles of, and a framework for action on, sustainable development. The principles of sustainable development have been further set out in the 2002 Johannesburg Declaration.[69] Sustainable development is also referred to in a host of international legal standards, though most often in a preambular paragraph, or in a paragraph setting out the treaty's objectives.[70] For example, it is included in the preamble to the WTO agreement.[71] All of these previous standards lay the groundwork for the recently adopted Sustainable Development Goals, discussed above.

The normative status of the concept of sustainable development in international law is uncertain, though it is 'undoubtedly a central concept in international politics'.[72] What is settled is that it can be considered part of the object and purpose of a host of international treaties,[73] and is thus, under the Vienna Convention on the Law of Treaties (VCLT), relevant to the interpretation the provisions of those treaties.[74] The concept has been referred to by the International Court of Justice in the *Gabcikovo – Nagymaros Case*,[75] and confirmed by the Permanent Court of Arbitration.[76] Its inclusion in the WTO preamble was considered to have interpretive effect in the *Shrimp Turtle* case.[77] These cases sanction sustainable development

[66] French, *International Law and Policy of Sustainable Development* (2005 Manchester UP) 14 – 15.
[67] UNEP, Rio Declaration on Environment and Development (14 June 1992) (1992) 31 ILM 874.
[68] United Nations Sustainable Development, 'Agenda 21- United Nations Conference on Environment & Development' Rio de Janerio 3 – 14 June 1992, (June 1992).
[69] Johannesburg Declaration on Sustainable Development, A/CONF.199/20 (4 September 2002).
[70] See French, (n 66) 43.
[71] Marrakesh agreement establishing the world trade organization (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 154, preamble.
[72] French, (n 66) 45, and see ibid 15 – 16, 37 - 50; Lowe, 'Sustainable Development and Unsustainable Arguments' in Boyle and Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford University Press, 1999) 36; Boyle and Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford University Press, 1999) 16 - 18.
[73] See Cordonier-Segger & Khalfan, *Sustainable Development Law: Principles, Practice and Prospects* (Oxford University Press, 2004) Ch 5.
[74] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980), 1155 UNTS 331; 8 ILM 679 Article 31(1).
[75] Case Concerning the Gabčikovo-Nagymaros Dam (25 September 1997) (Hungary/Slovakia) (Judgment) [1997] ICJ Rep, 7, 162.
[76] Arbitration Regarding the Iron Rhine ("Ijzeren Rijn") Railway (Belgium/Netherlands) (24 may 2005) Reports of the international Arbitral Awards Vol XXVII 35 - 125 para 59.
[77] World Trade Organization, US – Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Appellate Body (12 Oct 1998) WT/DS58/AB/R paras 129, 131.

as a norm to interpret economic development in a balanced and mutually supportive fashion with both environmental and social goals.

The relevance of sustainable development for indigenous peoples rests on their ties to the land. The devastation of lands and the ecosystems they support through rampant, destructive development for pure economic gain is linked to their destruction as peoples.[78] In addition, however, indigenous peoples have often been held up as communities living in exemplary, sustainable relationship with the earth.[79] The Brundtland Report itself pronounced that indigenous communities 'are the repositories of vast accumulations of traditional knowledge and experience' from which we 'could learn a great deal … in sustainably managing very complex ecological systems.'[80]

Thus, indigenous peoples' role in, and need for, sustainable development has also been recognized in international instruments. The 1992 Rio Declaration on Environment and Development states in Principle 22:

> Indigenous people and their communities […] have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.[81]

Similarly, the 1995 Copenhagen Declaration on Social Development commits states to take action to 'Recognize and support indigenous people in their pursuit of economic and social development, with full respect for their identity, traditions, forms of social organization and cultural values.'[82] The World Bank also recognises the role of indigenous peoples in sustainable development.[83]

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[78] Lars Anders Baer, 'Protection of Rights of Holders of Traditional Knowledge, Indigenous and Local Communities' (2002) World Libraries 12(1) 17; Magdagasang and Riches 'Resource Development Versus Indigenous Rights in the Philippines' (1999) 71 Indigenous Law Bulletin 71.
[79] See Richardson, 'The Ties that Bind: Indigenous Peoples and Environmental Governance' in Richardson, Imai, McNeil (eds) *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart, 2009) 337, 340 - 43.
[80] Brundtland Report (n 65) 114 – 15.
[81] Rio Declaration, (n 67) Principle 22.
[82] World Summit for Social Development, Copenhagen Declaration on Social Development, UN Doc. A/CONF.166/9 14 March 1995, para 26(m).
[83] World Bank OP 4.10 (n 52) para 2.

On the positive side, a principle of sustainable development can reinforce indigenous worldviews and perspectives on development. At the same time, indigenous peoples can draw on sustainable development to move beyond narrow economic development paradigms. However, criticisms of sustainable development and its potential persist, often grounded in the analysis that sustainable development does not fundamentally alter the paradigm of economic development based on the exploitation of both the earth and its peoples.[84] Mander and Tauli-Corpuz's work on the 'Paradigm Wars' focuses centrally on indigenous peoples in this respect.[85] This criticism thus brings us to the developing law and policy of indigenous driven and indigenous world-view based development.

Indigenous Driven- and Indigenous World-View Based Development

In 2006, Mander and Tauli-Corpuz brought indigenous worldviews of development to the forefront in their influential *Paradigm Wars: Indigenous Peoples' Resistance to Globalization*.[86] They argued for a need to understand development as grounded in indigenous cosmologies, languages, practices and demands. Rather than synthesizing economic development with the needs of the poor and the good of the natural environment, this is an argument for development based on, often, fundamentally different values. It is grounded in counter-hegemonic visions of human rights, the insistence on a need to decolonise Eurocentric versions of international law, and to situate rights, and particularly development, in alternative paradigms such as 'interculturality' and international poverty law.[87]

[84] de Piva Durante, 'Environment and Development Debate: Paradoxes, Polemics and Panaceas' 9 Griffith Law Review (1999) 258; Atapattu, 'Sustainable Development, Myth or Reality? A Survey of Sustainable Development Under International Law and Sri Lankan Law' (2001) 14 Georgetown International Environmental Law Review 279.

[85] Mander and Tauli-Corpuz *Paradigm Wars: Indigenous Peoples' Resistance to Globalization* (2006 Sierra Club Books).

[86] Ibid.

[87] See Pérez-Bustillo (n 16). See also Walsh, Interculturalidad crítica y (de) colonialidad: Ensayos desde Abya Yala (Quito, Abya Yala/ICCI-ARY, 2009); Pérez-Bustillo, 'Towards International Poverty Law: The World Bank, Human Rights, and Indigenous Peoples in Latin America' in van Genugten, Hunt and Mathews (eds) *The World Bank, IMF, and Human Rights*, (Wolf Legal Publishers, 2003); Pérez-Bustillo and Karla Hernández-Mares, *Human Rights, Hegemony and Utopia in Latin America: Poverty, Forced Migration, and Resistance in Mexico and Colombia*, (Brill, 2016).

At the level of international organisations, various regions have made specific progress in this respect. The European Council, in a Resolution adopted on 30 November 1998,[88] undertook to respect the concept of "self-development" by indigenous peoples, which the Resolution defines as the 'shaping of their own social, economic, and cultural development and their own cultural identities,'[89] and which includes respect for their 'right to choose their own development paths', the 'right to object to projects, in particular in their own traditional areas', and to compensation 'where projects negatively affect' their livelihoods.[90] The European Commission´s May 1998 Working Document regarding "support for indigenous peoples in the development cooperation of the Community and the Member States",[91] which helped lay the basis for the November 1998 Resolution, specifically refers to the Draft UNDRIP as one of the bases for its approach.[92]

The Inter-American Development Bank's (IADB) policy for indigenous peoples specifically emphasises meanwhile the need to 'promote the institutionalization of the information, timely diffusion, consultation, good faith negotiation and participation mechanisms and processes' necessary to fulfil 'commitments made both nationally and internationally regarding consultation with and participation of indigenous peoples in the issues, activities and decisions that affect them,' and that such 'mechanisms and processes must take into account the general principle of the free prior and informed consent of indigenous peoples as a way to exercise their rights' and to 'decide their own priorities for the process of development...and to exercise control, to the extent possible, over their own economic, social, and cultural development,' in language anticipating the essence of Articles 19, 20, 21, and 24 of UNDRIP.

Similarly the IADB´s 2006 Strategy for Indigenous Development[93] adopts the paradigm of 'development with identity'[94], which it defines in terms of principles such as 'equity,

[88] European Council, 'Indigenous peoples within the framework of the development cooperation of the Community and the Member States' Resolution of 30 November 1998.
[89] Ibid para 2.
[90] Ibid Para 5.
[91] European Commission, 'On support for indigenous peoples in the development co-operation of the Community and the Member States' (*Working Document of the Commission of May 1998*, May 1998).
[92] European Council, 'Indigenous peoples within the framework of the development cooperation of the Community and the Member States' (n 88).
[93] Inter-American Development Bank, Operational Policy on Indigenous Peoples and Strategy for Indigenous Development (OP-765 and Strategy GN-2387-5) (IADB, July 2006).
[94] Ibid 18 – 21.

wholeness, reciprocity, and solidarity'[95], concepts which are present in either or both of the approaches developed in terms of the alternative Andean indigenous paradigms of "living well" or "collective well-being" in the Bolivian and Ecuadorian constitutions, and which at minimum are convergent with such approaches. These new constitutional paradigms post-date the adoption of UNDRIP, and are discussed below in Part IV.

Meanwhile the UNDP explicitly recognizes the right to 'free prior informed consent' by indigenous peoples in the context of development processes and ties it directly to the UNDP´s understanding of their 'right to development'[96] and rights to self-determination and autonomy, while carefully anchoring its overall approach within the framework of larger trends as to the recognition of indigenous rights within the UN system.[97]

As such, international agencies and bodies were increasingly paying attention to indigenous driven development needs as the UNDRIP was being negotiated. Further developments post UNDRIP are discussed below in Part IV.

i The Socio-Economic Rights of Indigenous Peoples

As a preliminary point, it is important to note that each indigenous individual is entitled to all economic and social rights contained in international and relevant regional human rights covenants. These rights include those in the ICESCR, such as the right to an adequate standard of living in Article 11(1) within which fall the right to adequate food, clothing and housing; the right to health in Article 12; the Right to education in Article 13; the right to social security in Article 9; and Article 6's labour rights.

Indigenous people in Africa are entitled to the rights in the African Charter on Human and Peoples Rights, which include the right to work, in Article 15; the right to health and medical attention in Article 16; and the right to education and cultural life in Article 17. They also enjoy a right to housing, implied into the Charter by the African Commission.[98] Indigenous

[95] Ibid 5.
[96] UNDP, *UNDP and Indigenous Peoples: A Policy of Engagement* (UNDP 2001) para 27 – 28.
[97] Ibid.
[98] See Communication 155/96, *Social and Economic Rights Action Center (SERAC) and Centre for Economic and Social Rights (CESR) v Nigeria* [2001] AHRLR 60 (Ogoni Case); Communication 276/03, *Centre for Minority*

people across Europe would be entitled to the social and economic rights under the European Social Charter[99] and Revised European Social Charter,[100] while indigenous people in the Americas should enjoy all rights under the OAS's Protocol San Salvador.[101] Indigenous peoples in the Arab World are entitled, meanwhile, to those social and economic protections in the Arab Charter on Human Rights.[102]

The enjoyment of these rights is crucial to the survival, personhood, dignity and human flourishing of every person, but they are even more relevant to indigenous people, given their overwhelming economic and social marginalisation across the world.

The economic marginalisation of indigenous peoples was recognised in ILO 107. Article 3(1) provides that:

> So long as the social, economic and cultural conditions of the populations concerned prevent them from enjoying the benefits of the general laws of the country to which they belong, special measures shall be adopted for the protection of the institutions, persons, property and labour of these populations.

3(2) specified that care should be taken that special measures did not result in 'creating or prolonging a state of segregation,' which could be seen as recognition that 'separate but equal' rarely results in equality itself, but the overall assimilationist stance of ILO 107 gives the provisions a different character, focusing the provision on the limited duration of special measures until integration is achieved. Article 6, on the economic development of areas inhabited by indigenous peoples, states that:

> The improvement of the conditions of life and work and level of education of the populations concerned shall be given high priority in plans for the over-all

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Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v Kenya [2009] AHRLR 75.

[99] European Social Charter (1965) CETS no 035 (opened for signature 18 October 1951, entered into force 26 February 1965).

[100] European Social Charter (Revised) (1999) CETS no 163 (opened for signature 2 may 1996, entered into force July 1 1999).

[101] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, (opened for signature 17 November 1988, entered into force 16 November 1999) OAS Treaty Series no 69 (1989) 28 ILM 156.

[102] Arab Charter on Human Rights' (adopted 15 September 1994, entered into force 15 March 2008).

> economic development of areas inhabited by these populations. Special projects for economic development in the areas in question shall also be designed as to promote such improvement.

Part IV, which dealt with vocational training, handicrafts and rural industries, guaranteed the same vocational training opportunities to indigenous people as the general population, but also envisaged, in a highly culturally imperialist fashion, that special training might be needed. As set out in Article 17(2):

> These special training facilities shall be based on a careful study of the economic environment, stage of cultural development and practical needs of the various occupational groups among the said populations; they shall, in particular enable the persons concerned to receive training necessary for the occupations for which these populations have traditionally shown aptitude.

Likewise, Article 18 envisaged these handicrafts and rural activities as 'factors in the economic development of the populations concerned' to be encouraged 'in a manner which will enable these populations to raise their standard of living and adjust themselves to modern methods of production and marketing.'

More positively, ILO 107 did provide for the progressive extension of social security to indigenous people, and, in Article 20, States committed to 'assume responsibility for providing adequate health services for the populations concerned.' Article 21 provided for equal opportunity to education at all levels, but Article 22 reintroduced paternalistic assumptions about the levels of education appropriate for these communities.

A major shift in tone and assumption occurred in ILO 169. ILO 169 Article 2(2)(c) calls on governments to take measures for 'assisting the members of the peoples concerned to eliminate socio-economic gaps that may exist between indigenous and other members of the national community, in a manner compatible with their aspirations and ways of life'. Article 20 deals with employment; Article 21 with vocational training; Article 24 with social security; and Article 25 with health services.
Article 7(2) meanwhile states that:

> The improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and cooperation, shall be a matter of priority in plans for the overall economic development of areas they inhabit. Special projects for development of the areas in question shall also be so designed as to promote such improvement.

This provision crucially includes the need for indigenous cooperation and participation in development and economic and social improvement, importantly taking steps to rectify the *imposition* of social and economic improvement on indigenous communities through development of their lands and territories in ILO 107 6(1).

The Inter-American Court on Human Rights (IACtHR) has also specifically addressed the socio-economic conditions of indigenous peoples through the paradigm of the right to life under the American Convention on Human Rights (ACHR).[103] In its 2006 *Sawhoyamaxa v Paraguay* case,[104] the Court found that the disastrous results of the removal of the community from their ancestral lands 'where they could have used and enjoyed their natural resources, which resources are directly related to their survival capacity and the preservation of their ways of life'[105] resulted in the violation of their rights to life. More specifically, the Court also focused on the right to health and health care of the indigenous peoples. They rejected the argument that the indigenous people had a responsibility to travel to health centres outside the Community to seek out treatment,[106] noting the evidence that even those who sought treatment were either turned away because they were unable to pay, or given substandard treatment and attention due to discrimination against them.[107] The Court found a violation of the right to life under Article 4(1) of the ACHR and, with respect to the children who had died – most of easily preventable and treatable causes – Article 19 of the ACHR.[108] The case is especially important because it departs from the previous ruling in *Yaxye Axe v*

[103] American Convention on Human Rights (Pact of San José) (adopted 22 November 1969, entered into force 19 July 1978) 1144 UNTS 123.
[104] *Case of the Sawhoyamaxa Indigenous Community v Paraguay* (Merits, Reparations and Costs) IACtHR Series C No 146 (29 March 2006).
[105] Ibid para 164.
[106] Ibid para 173.
[107] Ibid para 174.
[108] Ibid para 176 – 178.

Paraguay,[109] where the IACtHR had not found the State responsible for individual deaths, (due to lack of evidence) even though it had held the State 'abridged' Article 4(1) of the ACHR, by failing to take measures 'regarding the conditions that affected [the Yaxye Aka's] possibility of having a decent life'.[110] Both *Yakye Aka* and *Sawhoyamaxa* also turned on the special vulnerability of the individuals and communities involved, to which we now turn.

ii Groups with Special Vulnerabilities

Pre-existing Standards on Groups with Special Vulnerabilities

Not only do international and regional human rights instruments include specific provisions to ensure the equality and rights of those who are particularly vulnerable or marginalized, but a number of specific covenants exist specifically to provide for the rights protection of those groups.

In the general human rights covenants, Articles aimed at the prevention of discrimination against women and the equal guarantee of human rights to women can be found in: Article 2 of the UDHR, Article 2 of both ICESCR and the International Covenant on Civil and Political Rights[111] (ICCPR); and in the Convention on the Elimination of All Forms of Discrimination against Women[112] (CEDAW). Attention is also drawn here to Article 3 of both ICCPR and ICESCR, which reads:

> The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all … rights set forth in the present Covenant.

Article 10 of ICESCR provides for special protections under certain circumstances for women and children in the context of its recognition of the special role of families and

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[109] Yakye Axa Indigenous Community v Paraguay (Merits, Reparations and Costs) IACtHR Series C no 125 (17 June 2005).

[110] Ibid para 176.

[111] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

[112] Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

family-related rights. And Article 12(2)(a) places obligations on states to take steps towards the full realization of the right to health, specifically for 'for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child'. Interpreting the Convention on the Rights of the Child[113] (CROC), the Committee on the Rights of the Child's (CRC) General Comment 13, on the right of the child to freedom from all forms of violence, notes that indigenous children tend to be those of particular vulnerability,[114] including to discriminatory treatment by the authorities which can lead to their torture and inhuman or degrading treatment or punishment, and their removal from their families.[115]

In the African Context, the ACHPR Article 18(3) requires the state to ensure 'the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.' Article 18(4) guarantees that 'the aged and the disabled shall also have the right to special measures of protection in keeping with their physical and moral needs.'

Under the OAS, the ACHR Article 19 provides for the protection of the rights of minor children. The Protocol San Salvador provides for special protection of children, mothers and adolescents in Article 15, and deals specifically with children's rights in Article 16. Article 17 provides protection for the elderly, and Article 18 for 'the handicapped.'

The Inter-American Court of Human Rights has also interpreted the right to life in Article 4 ACHR as a 'right to a dignified life or 'vida digna' which imposes enhanced state obligations to ensure the socio-economic conditions of particularly vulnerable groups.[116] Those vulnerable groups include children and pregnant women, the elderly, and indigenous peoples denied their ancestral lands.[117] Indigenous peoples' rights in this context have been set out in the *Yakye Axa* and *Sawhoyamaxa* cases, where the state's responsibility for violation of

[113] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.
[114] UNCRC, General Comment No 13 (2011) The Right of the Child to Freedom from all forms of Violence (18 April 2011) CRC/c/gc/13 para 72(g).
[115] Ibid fn 26 and see para 26.
[116] *Sawhoyamaxa v Paraguay* (n 104); Hohmann *The Right to Housing: Law, Concepts, Possibilities* (Hart 2013) 87 – 89.
[117] Pasqualucci, 'The Right to a Dignified Life (Vida Digna): The Integration of Economic and Social Rights with Civil and Political Rights in the Inter-American Human Rights System' (2008) 31 Hastings International and Comparative Law Review 1, 12.

human rights under the ACHR turned importantly on the vulnerability of the individuals and communities involved.[118]

European Human Rights Conventions likewise include attention to the rights of the vulnerable and marginalised. The Revised European Social Charter includes attention to the special needs and rights of women in Articles 4, 8, and 27, the rights of children and young persons in Article 7, and in Article 17 provides specifically for children and young person's economic and social protection. Article 15 gives rights of economic and social integration to those with disabilities. Article 23 gives elderly people the right to social protection. The European Convention on Human Rights[119] (ECHR) prohibits discrimination in terms similar to ICCPR and ICESCR Article 3, while its Protocol 7[120] Article 5 ensures equality between spouses in marriage, and takes special account of the rights of the child. ECHR Protocol 12[121] provides a more general provision on the right to equality.

Subject specific Covenants exist specifically to protect the rights of vulnerable groups of people, whose rights have not been adequately guaranteed by generally applicable human rights law. The CEDAW, the CROC and the Convention on the Rights of Persons with Disabilities[122] (CRPD) are the key referents in international human rights law. All three instruments are among those with the highest levels of universal acceptance in the international system. The CROC makes specific reference in Article 30 to the cultural rights of indigenous children, while the Preamble of the Convention on the Rights of Persons with Disabilities identifies that indigenous persons with disabilities are particularly vulnerable and often suffer from multiple discriminations.[123]

[118] See Yakye Aka (n 109) para 160 – 175; Sawhoyamaka (n 104) para 157 – 160.
[119] European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) CETS 5, as amended.
[120] Protocol 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 22 November 1984, entered into force 1 November 1988) 1525 UNTS 195.
[121] Protocol 12 to the European for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 2000, entered into force 1 April 2005) ETS 177.
[122] Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3.
[123] Ibid, Preamblular para P.

Of particular relevance is also the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women[124] (Convention of Belém do Pará), which builds on CEDAW but adds greater specificity to issues relating to sexual and gender violence. Article 6(b) for example affirms the 'right of women to be valued and educated free of stereotyped patterns of behavior and social and cultural practices based on concepts of inferiority or subordination.' Article 9 emphasises that:

> With respect to the adoption of the measures in this Chapter, the States Parties shall take special account of the vulnerability of women to violence by reason of, among others, their race or ethnic background or their status as migrants, refugees or displaced persons. Similar consideration shall be given to women subjected to violence while pregnant or who are disabled, of minor age, elderly, socioeconomically disadvantaged, affected by armed conflict or deprived of their freedom.

Older persons[125] lack an international instrument or framework equivalent to that of women or children. The UN OHCHR has called for intensified efforts to address their needs and in recent years a UN Open-ended Working Group on Ageing was convened and a Public Consultation on the Rights of Older persons was held under the auspices of OHCHR[126]. Much of this gradually emerged as a result of the adoption of a Resolution by the UN General Assembly in December 1990 establishing October 1 each year as the International Day of Older Persons[127]

ILO Convention 169 also specifically protects, in Article 3, all human rights of indigenous human beings and peoples, 'without hindrance or discrimination' and notes that 'the provisions of the Convention shall be applied without discrimination to male and female members of these peoples'.

[124] Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (adopted 9 June 1994, entered into force 5 March 1995) 33 ILM 1534.
[125] To adopt the terminology of Office of the UN High Commissioner for Human Rights: OHCHR, *Human Rights of Older Persons* at http://www.ohchr.org/EN/Issues/OlderPersons/Pages/OlderPersonsIndex.aspx (accessed 24 Nov 2016).
[126] Ibid.
[127] UNGA A/Res 45/106 (14 December 1990).

There is, accordingly, a wealth of international law on the rights of vulnerable groups, much of which brings together law that prohibits discrimination with law that seeks to protect those who have particular vulnerabilities. Intersecting vulnerabilities, however, and multiple bases of discrimination, mean that very often, indigenous peoples are least able to benefit from their internationally recognised rights.[128] This brings us to the need for special measures to redress such situations, discussed in the section below.

Special Measures

Special measures seek to give effect to substantive equality in the enjoyment of human rights. Provision for special measures is made in the International Convention on the Elimination of all forms of Racial Discrimination[129] (ICERD) Article 1(4) and 2(2), interpreted in the ICERD Committee's General Recommendation 32, which obliges states to take 'temporary special measures designed to secure to disadvantaged groups the full and equal enjoyment of human rights and fundamental freedoms.'[130] Special measures are also a part of the legal architecture of the CEDAW (in Article 4), the ECHR (in Article 5) and ILO Convention 169 20(1) which is directed specifically to indigenous peoples as workers, and states that special measures are required to 'ensure the effective protection with regard to recruitment and conditions of employment of workers belonging to [indigenous] peoples.'

The concept is discussed extensively by Kirsty Gover in Chapter 7 of this volume, in light of the UNDRIP's provisions on equality in Article 2. However, special measures are included explicitly only in Article 21 of the UNDRIP, and the scope of these measures will be discussed further below in Part V.

II. The Drafting History of the Articles

[128] For a discussion of these issues with respect to CEDAW see Buckner-Inniss, Hohmann and Tramontana '*Kell v Canada*' in Hodgson and Lavers (eds) *Feminist International Judgments* (Hart, forthcoming).
[129] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195.
[130] UNCERD, General Recommendation No 32 'The Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms of Racial Discrimination' CERD/C/GC/32 (24 September 2009) para 11.

As with much of the UNDRIP's negotiating history, the discussions regarding the provisions analysed in this chapter were complex and lengthy. In the synopsis that follows, we concentrate on the main issues of contention. These were: indigenous development of and control over economic and political systems and the means of subsistence and development; special measures; the relationship between traditional medicinal systems and the right to health; compensation; and a general concern with the clarity of and overlap between and among provisions. After tracing the early development of principles, this section turns to consider these four main issues in the negotiations.

II A Early Development of Principles

From the earliest discussions in the Working Group on Indigenous Populations (WGIP), indigenous peoples insisted on the interrelationship between self-determination, cultural identity and survival and the right to development, to control over their own internal economic affairs, and to health and physical integrity.[131] Accordingly, the right to development, socio-economic rights and conditions, and issues of cultural survival were linked from the first with the central issue of self-determination.

Draft Principle 9 stated that indigenous peoples had '[t]he right to be secure in the enjoyment of their own traditional means of subsistence, and to engage freely in their traditional economic activities, without adverse discrimination.'[132] Meanwhile, Draft Principle 10 stated that indigenous peoples had '[t]he right to determine, plan and implement all health, housing, and other social and economic programmes affecting them.'[133] Draft Principle 8 included attention to special measures, calling for 'the right to special State measures for the immediate, effective and continuing improvement of [indigenous] social and economic conditions, with their consent, that reflect their own priorities.'[134]

Although there was little real controversy surrounding these provisions at this stage, a few states noted that Draft Principle 10 would give undue influence to indigenous peoples in the

[131] UN Sub-Commission on Prevention of Discrimination and Protection of Minorities *Report of the Working Group on Indigenous populations on its Fifth Session* E/CN.4/Sub.2/1987/22 (24 August 1987) para 53.
[132] Ibid Annex II.
[133] Ibid.
[134] Ibid.

design and planning of health services within the state.[135] Canada stated, meanwhile, that any special measure or duty on states in this regard should be seen as 'means rather than an end in itself.'[136] Some states also expressed concern about the purpose and duration of special measures.[137]

The Declaration of Principles adopted by the Indigenous Peoples' Preparatory Meeting in 1987 had put forward a particularly strong stance on indigenous traditional medicines, which serves as a further important reminder that economic, social and *cultural* rights are linked in very specific and deeply tangible ways for indigenous peoples. Clause 21 stated that:

> All indigenous nations and peoples have the right to their own traditional medicine, including the right to the protection of vital medicinal plants animals and minerals. Indigenous nations and peoples also have the right to benefit from modern medical techniques and services on a basis equal to that off the general population of the States within which they are located. Furthermore, all indigenous nations and peoples have the right to determine, plan, implement, and control the resources respecting health, housing, and other social services affecting them.[138]

Two years later, in 1989, a First Revised Text of the Draft Universal Declaration on the Rights of Indigenous Peoples was prepared by the WGIP.[139]

The relevant draft principles had, at this point, been substantially reframed. Self-determination of social and economic programmes was included in Draft Article 20, as follows:

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[135] UN Sub-Commission on Prevention of Discrimination and Protection of Minorities Working Group on Indigenous Peoples, *Standard-Setting Activities: Evolution of Standards Concerning the Rights of Indigenous Populations, Information Received from Governments* E/CN.4/Sub.2/AC.4/1988/2 (24 May 1988) (Finland); UN Sub-Commission on Prevention of Discrimination and Protection of Minorities Working Group on Indigenous Peoples *Standard-Setting Activities: Evolution of Standards Concerning the Rights of Indigenous Populations Information Received from Governments* E/CN.4/Sub.2/AC.4/1988/2/Add.1 (14 June 1988) (Canada).
[136] Ibid, E/CN.4/Sub.2/AC.4/1988/2/Add.1 (Canada).
[137] Ibid.
[138] Report of the WGIP, 5th Session (n 131) Annex V.
[139] UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *First Revised Text of the Draft Universal Declaration on Rights of Indigenous Peoples Prepared by the Chairman-Rapporteur of the Working Group on Indigenous Populations, Mrs Erica-Irene Daes*, pursuant to Sub-Commission resolution 1988/18. E/CN.4/Sub.2/1989/33 (15 June 1989).

> The right to determine, plan and implement all health, housing and other social and economic programmes affecting them, and as far as possible to develop, plan and implement such programmes through their own institutions.

Self-determination and self-driven development were clearly enshrined in these draft provisions. The most complex and multi-layered provision was clearly what stood as draft Article 18:

> The right to maintain and develop within their areas of lands or territories their traditional economic structures and ways of life, to be secure in the traditional economic structures and ways of life, to be secure in the enjoyment of their own traditional means of subsistence, and to engage freely in their traditional and other economic activities, including hunting, fresh- and salt-water fishing, herding, gathering, lumbering and cultivation, without adverse discrimination. In no case may an indigenous people be deprived of its means of subsistence. The right to just and fair compensation if they have been so deprived.

It might be tempting to construe this provision as an unwieldy 'catch-all' but it is better understood as an attempt to capture the nuances of indigenous self-determination and development through and within the cultural integrity and survival of indigenous peoples, and in light of the present realities of the poverty, marginalization and dispossession of indigenous peoples across the world. The right to compensation sits perhaps oddly here, but is another cardinal concern for indigenous peoples.

The 'right to special State measures for the immediate, effective and continuing improvement of their social and economic conditions, with their consent, that reflect their own priorities' was included as a stand-alone right in Draft Article 19.

In 1990, governments were invited to comment on the text.[140] Subsequently, in 1993, the WGIP agreed a revised text of 42 operative paragraphs, which was submitted to the Human

[140] See UN Sub-Commission on Prevention of Discrimination and Protection of Minorities *Report of the Working Group on Indigenous Populations on its eighth session*, E/CN.4/Sub.2/1990/42 (27 August 1990).

Rights Council's Sub-Commission on Prevention of Discrimination and Protection of Minorities.[141]

The WGIP agreed on a text at its 11th session in 1993,[142] the draft Articles were then phrased as follows:

> Draft Article 21
>
> Indigenous peoples have the right to maintain and develop their political, economic and social systems, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.
>
> Indigenous peoples who have been deprived of their means of subsistence and development are entitled to just and fair compensation.
>
> Draft Article 22
>
> Indigenous peoples have the right to special measures for the immediate, effective and continuing improvement of their economic and social conditions, including in the areas of employment, vocational training and retraining, housing, sanitation, health and social security. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and disabled persons.
>
> Draft Article 23
>
> Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to determine and develop all health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

[141] UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Draft Declaration on the Rights of Indigenous Peoples, Revised working paper submitted by the Chairman-Rapporteur, Mrs Erica-Irene Daes, pursuant to Sub-Commission resolution 1992/33 and Commission on Human Rights resolution 1993/31* E/CN.4/Sub.2/1993/26 (8 June 1993).

[142] UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Report of the Working Group on Indigenous Populations on its Eleventh Session, Chairperson-Rapporteur: Ms Erica-Irene A Daes, Annex I: Draft Declaration as Agreed upon by the Members of the Working Group at its Eleventh Session*, E/CN.4/Sub.2/1993/29/Annex I (23 August 1993).

Draft Article 24

Indigenous peoples have the right to their traditional medicines and health practices, including the right to the protection of vital medicinal plants, animals and minerals.

They also have the right to access, without any discrimination, to all medical institutions, health services and medical care.

Draft Article 43

All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

Though some states felt the relevant articles were vague and 'could lead to situations of conflict with various State institutions'[143], the draft was then adopted by the UN Sub-commission on Prevention of Discrimination and Protection of Minorities in July 1994.[144]

II B Continuing Debate before the Working Group on the Draft Declaration

The draft text agreed at the WGIP 11th session was referred to the Commission on Human Rights, which created a further *ad hoc* working group.[145] Over the next decade, the working group met on eleven occasions to attempt agreement on the final text. During this period, indigenous participants adopted the still controversial 'no change' negotiating position, and many breakthroughs on the text only came very late in the day.[146]

[143] UN Sub-Commission on Prevention of Discrimination and Protection of Minorities Working Group on Indigenous Populations, *Standard-Setting Activities: Evolution of Standards Concerning the Rights of Indigenous Populations, Information Received from Governments*, E/CN.4/Sub.2/AC.4/1994/2 (9 June 1994) (Ecuador).

[144] See UN Sub-commission on Prevention and Discrimination and Protection of Minorities Res. 1994/45 (26 August 1994).

[145] *Establishment of a working group of the Commission on Human Rights to elaborate a draft declaration in accordance with paragraph 5 of General Assembly resolution 49/214* UNCHR Resolution 1995/32 (25 July 1995).

[146] Davis, 'Indigenous Struggles in Standard-Setting: The United Nations Declaration on the Rights of Indigenous Peoples' (2008) 9 Melbourne Journal of International Law 439, 449 – 450.

Although many of the provisions relevant to this chapter proved difficult to negotiate, there was overwhelming support from both States and Indigenous participants for Article 43. The only point of contention here was whether this important principle of equality between male and female indigenous persons would be better placed in the first section of the Declaration, alongside other 'general principles.'[147] In December 1997, this provision was adopted by consensus by the Working Group,[148] and remained unchanged, in content, and, ultimately, in its general placement in the Declaration though becoming finally Article 44. Likewise, there was little disagreement that attention should be included to the special vulnerabilities of particular groups.

The negotiating issues on Draft Articles 21 – 24 concerned several main substantive points, which included the issue of special measures; the issue of compensation; and indigenous development, and control over economic and political systems. A final point, raised throughout the discussion, was one of clarity of organisation.

i Indigenous Development of, and Control over, Economic and Political Systems and the Means of Subsistence and Development

While the protection of economic, social and cultural rights of indigenous peoples in Draft Article 21 – 24 were generally uncontroversial in and of themselves, and were seen as reflecting already existing international law,[149] it was their framing *within* provisions on indigenous development and self-determination that made these provisions difficult to agree. One indigenous representative characterized the draft provisions as giving content to the 'economic, social, cultural, spiritual and political dimensions of the right of self-determination.'[150] As such, they presented a challenge to states on several levels.

[147] See for example UNCHR, Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32, Chairperson-Rapporteur: Mr Jose Urrutia, E/CN.4/1997/102 (10 December 1996) paras 103 – 129.
[148] UNCHR, Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32, Chairperson-Rapporteur: Mr Jose Urrutia, E/CN.4/1998/106 (15 December 1997) para 41.
[149] UNCHR (n 147) para 199 (Canada).
[150] UNCHR, Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 , Chairperson-Rapporteur: Mr Luis-Enrique Chavez, E/CN.4/2001/85 (6 February 2001) para 101 (Indian law Resource Centre, Assembly of First Nations, International Treaty Four Secretariat and Grand Council of the Crees).

First, ongoing, often divisive and polarizing debates as to the meaning and implications of "development" during the negotiations explain in part why this concept is never defined explicitly in the text. For example, some states pointed out that they did not accept 'in an international context the right to development of States or groups' and could not accept collective development as a right.[151] At the same time, these controversies were not unrelated to underlying disagreements about the fundamental purposes and values of development.[152] For that reason, Draft Articles 21 – 24, with their emphasis on indigenous driven improvement of social and economic conditions and control over the processes of their development, stand in for an explicit, overall right to development and are closely related to final UNDRIP Article 3 on self-determination, discussed in Weller's Chapter 5 of this volume.

During negotiations, indigenous groups and NGOs held firmly to the view that the right to development must be indigenous driven. The World Council of Indigenous Peoples damned 'the devastating effects of so-called development on the lives, cultures, lands and rights of indigenous peoples'[153] as a 'direct result of the failure to respect our identity, cultures, rights to our lands and the ethnocentric and economicscentred [sic] biases of development itself.'[154] They relied for support on changing paradigms of development, towards participatory and human centred development incorporated into the work of multilateral development agencies such as the World Bank and UNDP and protected in the Rio Declaration and Agenda 21.[155]

Some states and international organizations were concerned that the provisions, and particularly the 'right to determine and develop all health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions' in Draft Article 23 gave indigenous peoples at the least, undue influence over these policies within the democratic process,[156] or gave indigenous peoples

[151] E/CN.4/1997/102 (n 147) para 221 (USA), 301, 304 (USA and Venezuela). See also UN Doc. E/CN.4/1996/84 (4 January 1996), paras 81, 97.
[152] See above Part I on right to development.
[153] UNCHR, Open-ended Inter-Sessional Working Group on a Draft United Nations Declaration on the Rights of Indigenous Peoples, Consideration of a Draft United Nations Declaration on the Rights of Indigenous Peoples, Information Received from Non-Governmental and Indigenous Organizations E/CN.4/1995/WG.15/4 (10 October 1995) para 21.
[154] Ibid.
[155] Ibid para 22.
[156] E/CN.4/1996/84 (n 151) para 80.

both special rights and all existing rights with no correlative duties.[157] Some states were concerned that, as phrased, Article 23 could give indigenous peoples sole control over all health, housing and other economic and social programmes in a state.[158] A selection of States also raised concerns that indigenous peoples would be able to claim priority access to state resources through the route of special measures.[159] When it came to the meaning specifically of 'their own means of subsistence and development', some states felt that his right was too broad and lacked clarity.[160]

As with all Articles in which existing indigenous institutions and knowledge were to gain protection, a number of states queried how these provisions would fit within existing legal frameworks. Argentina noted that despite its pluralistic Constitution, which respected culture and tradition, Article 24 'should not contravene public health regulations.'[161] Along with a concern for the coherence of the domestic legal framework, this statement also evidenced an oft-repeated anxiety about the safety of traditional medicinal practices.[162] It is indicative of the anxiety with which affording cultural rights to indigenous and minority groups is still met.

The main points of contention here, therefore, remained a strong belief on the part of indigenous representatives that only when economic and social rights were self-determined would they be meaningful and adequate, contrasted with state concerns about maintaining control over internal institutions and about unduly empowering indigenous peoples through the grant of special rights or special measures.

ii Special Measures

Draft Article 22's phrasing that 'Indigenous peoples have the right to special measures for the immediate, effective and continuing improvement of their economic and social conditions, including in the areas of employment, vocational training and retraining, housing, sanitation,

[157] UNCHR, *Open-ended Inter-Sessional Working Group on a Draft United Nations Declaration on the Rights of Indigenous Peoples, Consideration of a Draft United Nations Declaration on the Rights of Indigenous Peoples, Information Received from Intergovernmental Organization*, E/CN.4/1995/WG.15/3 (10 November 1995), para 1 (UNFAO).
[158] E/CN.4/1998/106 (n 148) para 41.
[159] E/CN.4/1996/84 (n 151) para 81.
[160] E/CN.4/1997/102 (n 147) para 230 (Malaysia).
[161] Ibid para 85 (Argentina). See also ibid para 82 (France), para 86 (Malaysia).
[162] Ibid.

health and social security' prompted negotiations over the meaning and purpose of 'special measures.'

Some states and most indigenous participants were strongly in favour of special measures for indigenous peoples, given as Chile put it in 1995:

> 'the centuries-old disregard to which they have been subjected as a result of the assimilationist policies that sought to do away with their specific identities as peoples or, at best, to respect some of their forms of social organization but in a context of marginalization and extreme poverty'.[163]

Accordingly, such measures were needed to 'overcome their diminished circumstances' in a context of insufficient state support and commitment of resources.[164] Indigenous organisations, joined by some states, firmly held throughout that special measures did not amount to preferential measures, but were about the achievement of equal rights.[165]

Some states and international organisations, however, queried the purpose and meaning of special measures, including what sorts of discrimination special measures should deal with,[166] and the open-ended nature of the phrasing which was not tied explicitly to disadvantage.[167] Some states also raised concerns that indigenous peoples would be able to claim priority access to state resources through the route of special measures.[168]

The context of dire poverty and stubborn marginalisation in which indigenous peoples overwhelmingly live,[169] gives strong support to the claim that indigenous peoples have not benefited equally from the existence of general human rights standards or general social policies within states. State concerns that special measures might unduly *advantage* indigenous peoples must be understood in light of this reality.

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[163] UNCHR, *Open-ended Inter-Sessional Working Group on a Draft United Nations Declaration on the Rights of Indigenous Peoples, Consideration of a Draft United Nations Declaration on the Rights of Indigenous Peoples, Information Received from Governments*, E/CN.4/1995/WG.15/2 (10 October 1995), para 7 (Chile).
[164] Ibid.
[165] E/CN.4/1996/84 (n 151) para 82. See also E/CN.4/1997/102 (n 147) para 207 (Fiji), para 212 (Observer for the Central Land Council).
[166] E/CN.4/1995/WG.15/3 (n 157), para 1 (UNFAO).
[167] E/CN.4/1997/102 (n 147)) para 202 (Sweden), para 204 (Japan), para 219 (Norway).
[168] E/CN.4/1996/84 (n 151) para 81.
[169] See above Part I, 1 A - 1B.

iii Compensation

A right to 'just and fair compensation' for 'Indigenous peoples who have been deprived of their means of subsistence and development' was included in draft Article 21. The inclusion of a right to compensation in this article complicated its text considerably. First, it turned what would otherwise have been a prospective right into one with a retrospective element. Second, it connected – or alternatively entangled – the provision with other provisions, among them the most controversial of all, such as rights to land. As Mexico noted early in the negotiating process, it was difficult to understand this provision without regard to the draft provisions on lands and territories.[170] Even if 'the right to maintain and develop their political, economic and social systems, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities' *can* be conceptually separated from the land base on which these activities have traditionally been performed, compensation for loss of such subsistence means clearly encompasses the loss of lands.

Nevertheless, as the observer for the Central Land Council stated in 1996, it would have been a shame for Article 21 to be rejected 'simply out of fear of the possibility of claims for compensation.'[171] As such, linking together rights to the means of subsistence and development with compensation was a risky strategically, even if conceptually there is growing recognition and evidence of the inherent link between lands, and subsistence and development for indigenous peoples. The eventual removal of this link in the text[172] was thus a matter of necessity for practical progress, rather than a move that succeeded in breaking a link that must, ultimately, be recognised.

iv Clarity, Organisation and Overlap with Other Provisions

The Draft text referred to the Commission on Human Rights was indeed far from clear and straightforward, with significant overlap between and among provisions. This led to repeated

[170] UNCHR, *Open-ended Inter-Sessional Working Group on a Draft United Nations Declaration on the Rights of Indigenous Peoples, Consideration of a Draft United Nations Declaration on the Rights of Indigenous Peoples. Information Received from Governments, Addendum,* E/CN.4/1995/WG.15/2/Add.1 (13 November 1995).
[171] E/CN.4/1997/102 (n 147) para 226 (Central Land Council).
[172] See below text accompanying footnote 177.

calls, particularly by States, to clarify and re-adjust the language of provisions,[173] as well as to move whole or parts of the draft articles discussed here.[174] At one point, discussion on Article 21 proposed deleting it based on the fact that all relevant parts were contained in other articles.[175] However, indigenous representatives held firm in the need to include an article stressing the right of indigenous peoples to be secure in their own means of subsistence and development. They sought to clarify 'the importance of social, economic and political systems associated with traditional subsistence and development rights of indigenous peoples.'[176]In light of this statement, it is important to understand that the apparent lack of conceptual clarity and organisation in the Draft Declaration was at least in part created by serious attempts to include within the Declaration attention to indigenous needs and rights which are not adequately captured by currently existing paradigms of human rights and international law. Among these are the link between traditional subsistence activities and cultures, self-determination, and economic and social well-being. These links are only now beginning to be recognised and protected, in many instances in explicit light of UNDRIP, as further discussed in Part IV

II C Moving Forward

There was little movement on these points of contention until, in 2004, a text by Denmark, Finland, Iceland, New Zealand, Norway, Sweden and Switzerland sought to overcome some of the areas of deadlock.

First, the proposal made Article 21 prospective again, by changing the provision to apply to those indigenous peoples who 'are deprived of their means of subsistence and development' and replacing the word compensation with 'effective mechanisms for redress.'[177]

[173] E/CN.4/1996/84 (n 151) para 82. See E/CN.4/1997/102 (n 147)) para 210 (Chile), para 235 (USA).
[174] E/CN.4/1997/102 (n 147)) para 227 (Norway), para 228 (Sweden), para 231 (Canada).
[175] Commission on Human Rights, Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 , Chairperson-Rapporteur: Mr Luis-Enrique Chavez, E/CN.4/2004/81 (7 January 2004), para 95.
[176] Ibid para 96.
[177] UNCHR, *Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32, Information Provided by States, Draft Declaration on the Rights of Indigenous Peoples: Amended Text, Denmark, Finland, Iceland, New Zealand, Norway, Sweden and Switzerland*, E/CN.4/2004/WG.15/CRP.1 (6 September 2004). See also the explanatory text at UNCHR, *Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32, Information Provided by States, Draft Declaration on the*

With regard to the issue of special measures, they proposed that Article 22 include an 'equal right to effective and continuing improvement of disadvantage in their economic and social conditions…'[178] This proposal removed the words special measures entirely, with explanatory text noting that 'basic criteria' for what special measures were was needed.[179] It tied the provision specifically to conditions of disadvantage.

To respond to the fear of undue indigenous influence or control in the design and development of economic and social programmes, the proposal substituted 'determine and develop all' with 'be actively involved in developing and determining' their health, housing and other programmes.[180] This change was suggested in order to ensure that 'democratically-elected representatives have the right to make final decisions.'[181]

With regard to the issue of whether or not traditional medicines were complementary to health services in general, the proposal clarified by inserting a Part 2 to the provision that enshrined the right to health as in Article 21(1) of ICESCR.[182] It also changed 'protection' to 'conservation'.

These suggestions helped to break the stalemate in negotiations, and in October of 2004, the Chairman was able to state that Article 22 was agreed.[183] That provision, as presented by the facilitators, now read:

Article 22

> Indigenous peoples have the right to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security. States shall take effective measures and, where appropriate, special measures to

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Rights of Indigenous Peoples: Explanatory Comments to Amended Text, Denmark, Finland, Iceland, New Zealand, Norway, Sweden and Switzerland, E/CN.4/2004/WG.15/CRP.2 (6 September 2004).

[178] E/CN.4/2004/WG.15/CRP.1 (n 177).

[179] E/CN.4/2004/WG.15/CRP.2 (n 177).

[180] E/CN.4/2004/WG.15/CRP.1 (n 177).

[181] E/CN.4/2004/WG.15/CRP.2 (n 177).

[182] E/CN.4/2004/WG.15/CRP.1 (n 177).

[183] UNCHR, *Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995, Chairman's Summary of Proposals (Mr. Luis-Enrique Chavez),* E/CN.4/2004/WG.15/CRP.4 (14 October 2004).

> ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

However, even subsequent to this text, quite different versions of Article 22 were proposed, such as the suggestion of the World Peace Council, which included a specific reference to the eradication of extreme poverty.[184]

In addition, several substantially different possibilities remained for each of Articles 21, 23, and 24.[185] These provisions were again summarised by the Chairman in April 2005, once more with several versions under consideration.[186] The continued disagreement over the provisions demonstrated that the right to development and the right to self-determination of indigenous peoples, within which their economic and social rights were to be enjoyed, remained controversial.

At the end of the Eleventh session of the working group,[187] consensus had still not been reached on Draft Articles 22, 23 and 24. Article 21 was described as 'close to agreement'[188] The text of the articles that went to the Human Rights Council had thus not been fully agreed by the negotiators at the Working Group.

The seemingly intractable negotiations had, perhaps, little to do with the actual wording of the provisions considered in this chapter, and can rather be best attributed to the general breakdown in negotiations over the text as a whole.[189] However, the specifics detailed here do illuminate the fact that indigenous representatives and States had significantly different perceptions about the relative power of indigenous peoples within states, and the need for indigenous driven institutions to achieve equality. While States saw special measures and

[184] UNCHR, *Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995, Chairperson-Rapporteur: Mr. Luis-Enrique Chavez, Addendum,* E/CN.4/2005/89/Add.1 (24 February 2005), C (Comments and Amendments to examined articles of the draft declaration on the rights of indigenous peoples formulated by the world Peace Council).
[185] Ibid.
[186] UNCHR, *Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995 on its Tenth Session, Chairperson-Rapporteur: Mr. Luis-Enrique Chavez, Addendum,* E/CN.4/2005/89/Add.2 (1 April 2005).
[187] Commission on Human Rights, Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995 on its Eleventh Session, Chairman-Rapporteur: Luis-Enrique Chavez, E/CN.4/2005/WG.15/CRP.1 (n 177) para 25.
[188] Ibid para 24.
[189] See further Davis, 'Standard Setting' (n 146).

indigenous led development or self-determination as a threat to authority and democratic processes, indigenous peoples saw them as a response to a history of dispossession, and as a basic need for continued physical and cultural survival, let alone future development and potential flourishing.

II D Text Approved by the Human Rights Council

The text went through further changes before being approved by the Human Rights Council in June 2006[190]

The Chairman's proposed Article 21 read:

> Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.
>
> Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

This version kept the prospective nature of the right to redress, and inserted a right to maintain *institutions* alongside economic and social systems.

Draft Article 22 became:

> Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.

[190] HRC Res No 1/2 of 29 June 2006 A/HRC/1/L.10 (30 June 2006).

> States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

In this version, the Chairman sought to clarify the nature of any special treatment due to indigenous peoples by inserting the words 'without discrimination' before 'the improvement of their economic and social conditions'. Special measures were removed from the first paragraph and placed below, in a second paragraph. In addition, the text sought to clarify that special measures were due only where appropriate.

The Chairman also endorsed the proposal for a new Article 22, discussed at the Eleventh Session. This was a specific article on the rights and needs of vulnerable indigenous persons:

Article 22bis stated:

> Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.
>
> States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

Importantly, this proposal also included a right to *full* protection for women and children against violence and discrimination.

Draft Article 23, which had proved so difficult for states to align with their domestic policies, remained in this proposal as the original draft text.[191]

Draft Article 25 stated that:

[191] See the discussion in II B above.

> Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.
>
> Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

This proposal did not move the provision forward, but consolidated the changes to the text negotiated throughout the eleven sessions.

II E Discussion on the Adoption of the Text at the UN General Assembly

On the 13th September 2007, the UN General Assembly was presented with a revised draft text that had emerged in negotiations subsequent to adoption of the Draft Text by the Human Rights Council, since that draft had not represented consensus. This revised draft[192] was presented to the General Assembly by the Chairperson of the Working Group, and endorsed by more than 35 states.[193] Other states, however, bemoaned the fact that they had not been afforded the opportunity to keep negotiating on the text in the final months.[194]

Many States, even those voting in favour of this final version of the Declaration, expressed considerable unease about some of the provisions. Thailand explicitly referenced Article 20 when it stated that the Declaration must be understood in accordance with the principles of territorial integrity or political unity in the Vienna Declaration and Programme of Action.[195] France referred to Article 20 when stating that the Declaration must be exercised in accord with national constitutional norms.[196] Japan remained firm in its opposition to collective rights as human rights,[197] which would have implications for its understanding of Articles 20 and 21. Many other states referenced the fact that it was only the last-minute inclusion of

[192] UNGA Res A/61/L.67.
[193] See UNGA 107th Plenary Meeting Thurs 13 Sept 2007 10am A/61/PV.107, 10.
[194] Ibid, 11 (Australia), 12 (Canada), 15 (USA).
[195] Ibid, 25 (Thailand).
[196] UNGA 107th Plenary Meeting Thurs 13 Sept 2007 1pm Doc A/61/PV.108, 10 (France).
[197] A/61/PV.107 (n 193), 20 (Japan).

Article 46 on the territorial integrity of states, that allowed them to support the Declaration, and by implications Articles such at 20 and 21 specifically.[198]

Australia, the USA and Canada, voting against, expressed dissatisfaction with the Declaration's treatment of the right to self-determination and self-government, stating that it 'is not a right that attaches to an undefined subgroup of a population seeking to obtain political independence'[199] a concern that would have implications for those states' understandings of Articles 20 and 21, although self-determination was not expressed in so many words in the final version of those articles.

Nevertheless, looking back to the concerns expressed about the draft Articles in the 1990s, it is obvious that the final text overcomes many of the anxieties expressed by states during the negotiations. More clarity and organisation was brought to the text. Specifically, compensation was excluded from these provisions, and concerns about the position of indigenous peoples and their special treatment were allayed by more tightly worded provisions. At the same time, the crucial links between indigenous-driven development, means of subsistence, and socio-economic rights were maintained and clarified.

We turn now to consider how the different rights expressed in final Articles 21, 22, 24 and 44 of the Declaration have influenced or otherwise been expressed or considered in international law and policy.

III. Analysing the Impact of Articles 21, 22, 24 and 44 on International Law and Policy

III A The Right to Development

The contribution to international law of the UNDRIP's provisions on the right to development can be addressed under three headings. The first is the growth of right to

[198] See for example Ibid, 19 (Argentina), 20 (Japan), 20 (Chile), 21 (USA), 23 (Liechtenstein), 25 (Thailand); A/61/PV.108 (n 196), 2 (India), 3 (Namibia), 5 (Turkey).
[199] A/61/PV.107 (n 193), 11 (Australia). See also, 12 (Canada), 15 (USA).

development for indigenous peoples that takes particular cognisance of inherent links with land rights and with cultural survival. The second, and related, is a recognition of the need for sustainable development as part of a meaningful right to development for indigenous peoples. The third – and building necessarily on the first two – is a nascent legal recognition, particularly in Latin America, of indigenous world-view based conceptions of development. These changes both reflect and rely on a perspective which approaches development as necessarily self-determined and indigenous driven.

i Development, Self-Determination and Survival

UNDRIP´s approach to the relationship between the imperatives and policies within the UN system as to development and the specific circumstances and rights of indigenous peoples must be understood within a historical and conceptual framework that takes due account of their longstanding marginalization as actors and subjects or referents within the international system, discussed above in Part I. This marginalization is also reflected in the persistent concentration among indigenous peoples of conditions of poverty and inequality on a global scale. Any right to development of indigenous peoples must also take account of the longstanding hostility of some states to a right to development per se, also discussed at the beginning of this chapter and raised again by states in the negotiation of the UNDRIP.

Nevertheless, the ILA Committee, in its Interim Report on the UNDRIP, noted a new trend in international law: that states are now more (though not universally) willing to accept a right to development for indigenous peoples than for other groups or peoples generally.[200]
This has been attributed in part to an effort to assuage post-colonial guilt or undo historical wrongs.[201] However, the connection between indigenous development and indigenous *survival*, and references to the interlinked nature of these rights (including through the right to self-determination) gives the right to development in the UNDRIP a distinction from a more general right to development that is also relevant to this emerging warmth to it on the part of States.

First, there is the crucial tie between development and the survival of indigenous peoples expressed in the UNDRIP. The reference to 'subsistence' in Article 20 should be understood

[200] ILA Interim Report (n 12) 37.
[201] Ibid.

within the context of the Declaration as an allusion to the survival of indigenous peoples as viable or sustainable communities with their distinct forms of governance and social life. This echoes for example the emphasis in the first substantive paragraph of the Preamble on indigenous peoples´ 'right to be different, to consider themselves as different, and to be treated as such', and that of Article 43 on their rights to "survival, dignity, and well-being". Subsistence here is thus intertwined with an emphasis on sustainability, as noted in Paragraph 11 of the Preamble. Ultimately this implies that indigenous autonomy is a necessary condition for indigenous survival, which in turn encompasses both sustainability and subsistence in development.

The African Commission's *Endorois* case[202] is important in this respect. In *Endorois*, Article 22 on the Right to Development of the ACHRP was interpreted as having a procedural and substantive element. That is the:

> right to development is a two-pronged test, that it is both *constitutive* and *instrumental*, or useful as both a means and an end. A violation of either the procedural or substantive element constitutes a violation of the right to development. Fulfilling only one of the two prongs will not satisfy the right to development.[203]

The Commission explicitly accepted that freedom of choice is an element of the right to development,[204] which would fulfil parts of the procedural element of the right, along with the free, prior and informed consent[205] and participation[206] of the Endorois.

The substantive element would require benefit sharing, and, following the IACtHR's *Saramaka* case,[207] the Commission noted that the right to development is violated when a development project decreases the well-being of the indigenous community.[208]

Concluding, the Commission found that:

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[202] *Endorois* (n 98).
[203] Ibid, para 277.
[204] Ibid para 278, referring to Arjun Sengupta, "The Right to Development as a Human Right," Francois-Xavier Bagnoud Centre Working Paper No. 8, (2000), 8.
[205] Ibid, para 283, 291.
[206] Ibid, para 289.
[207] *Case of the Saramaka People v Suriname* (Preliminary Objections, Merits, Reparations, and Costs) IACtHR Series C No 172 (28 November 2007).
[208] Endorois (n 98), para 294.

> the Respondent State bears the burden for creating conditions favourable to a people's development [Art 3 Declaration of the Right to Development]. It is certainly not the responsibility of the Endorois themselves to find alternate places to graze their cattle or partake in religious ceremonies. The Respondent State, instead, is obligated to ensure that the Endorois are not left out of the development process or benefits. The African Commission agrees that the failure to provide adequate compensation and benefits, or provide suitable land for grazing indicates that the Respondent State did not adequately provide for the Endorois in the development process.[209]

Although the Commission did not rely on the relevant articles of the UNDRIP, noting that Kenya had 'withheld its approval'[210] of the Declaration, the reasoning strengthens the links between indigenous development, survival, and improvement of social and economic conditions as set out in the UNDRIP. It also reinforces the link between self-determined development and free, prior and informed consent,[211] further strengthening the latter norm in international law.

Also linking survival and development, the CRC's General Comment 11 on Indigenous Children and their rights under the Convention urges states to ensure realisation of the right of indigenous children to 'survival and development as well as an adequate standard of living,' referencing articles 6 and 27 of the CRC.[212] The Committee has also urges states to take into consideration the link between land, life, survival, and development in the rights of indigenous children.[213] The CESCR has stated in General Comment 21 on the Right to take part in cultural life that indigenous peoples' rights to cultural identity are tied to their rights to land and that:

> Indigenous peoples' cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected,

[209] Ibid para 298, footnotes omitted.
[210] Ibid para 155.
[211] See further Barelli, Ch 9 of this volume.
[212] UNCRC General Comment No. 11 (2009), *Indigenous children and their rights under the Convention*, CRC/C/GC/11 (12 February 2009), para 34.
[213] Ibid para 35.

> in order to prevent the degradation of their particular way of life, including their means of subsistence, the loss of their natural resources and, ultimately, their cultural identity.[214]

In doing so, the CESCR made explicit reference to Article 20 of the UNDRIP.[215] In a statement on the Rio+20 Conference on the Green Economy the CESCR also noted the need to balance the requirement of a green economy with states' human rights obligations to indigenous peoples, with specific reference to their land and cultural rights as preconditions for their survival.[216]

The Inter-American Court of Human Rights has led in the recognition of indigenous rights to survival and the tie with the right to traditional lands. Even before the UNDRIP was adopted, several landmark cases had made this point. In the 2001 *Awas Tingni v Nicaragua*, the Court held that indigenous territories must be:

> understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.[217]

Sustainability of development is thus key for indigenous peoples, given that their lands are about so much more than, as the Court puts it, 'possession and production'.[218] In the *Yakye Axa* case, the Court found that the State was responsible for the violation of the right to life: having failed to ensure the right to communal property, the State had deprived the Community of the possibility of having access to their traditional means of subsistence, as well as the use and enjoyment of the natural resources necessary to obtain clean water and for the practice of traditional medicine for the prevention and treatment of diseases, and for

[214] UNCESCR General Comment 21: *Right of everyone to take part in cultural life*, E/c.12/CG/21 (21 December 2009) para 36.
[215] Ibid, fn 35.
[216] UNCESCR, *Statement in the Context of the Rio+20 Conference on 'the green economy in the context of sustainable development and poverty eradication'*, E/c.12/2012/1 (4 June 2012) para 6 (g).
[217] Case of the Mayagna Community (SUMO) Awas Tingni Community v Nicaragua (Merits, Reparations, and Costs) IACtHR Series C No 79 (31 August 2001) para 149.
[218] Ibid.

failing to adopt the affirmative measures required to ensure decent living conditions.[219] In 2006, *Sawhoyamaka v Paraguay*[220] made similar points, again relying heavily on the link between land and a decent life[221] The *Sarayaku*[222] decision further elaborated on this approach, and explicitly incorporated the implications of UNDRIP into its overall reasoning.[223] These cases also demonstrate the link between survival as a people, and individual survival or the right to life, discussed in Chapter 7 of this volume.

ii Sustainable Development

The second distinct strand in the right to development for indigenous peoples is the recognized need for sustainable development for indigenous communities, based in large part on the growing recognition in international law, discussed above, that indigenous peoples cannot survive as peoples without their traditional lands.

International institutions are beginning to take account of this emerging norm. For example, the World Bank Operational Policy on Indigenous Peoples, updated in 2013, states that:

> The Bank recognizes that the identities and cultures of Indigenous Peoples are inextricably linked to the lands on which they live and the natural resources on which they depend. These distinct circumstances expose Indigenous Peoples to different types of risks and levels of impacts from development projects, including loss of identity, culture, and customary livelihoods, as well as exposure to disease.[224]

These risks map directly onto the subject matter of the UNDRIP Articles discussed here. Meanwhile, however, the World Bank continues to insist that international human rights

[219] *Yakye Axa* (n 109) para 158(d) and (e). See also, *Case of the "Children's Rehabilitation Institute" v. Paraguay* (Preliminary objections, merits, reparations and costs) IACtHR Series C No 112 (2 September 2004), para 176; *Case of the La Rochela Massacre v. Colombia* (Merits, reparations and costs) IACtHR Series C No 163 (11 May 2007), paras 124, 125, 127 and 128; and *Case of Gelman v. Uruguay*, (Merits and Reparations) IACtHR Series C No 221 (24 February 2011) para 130.

[220] Sawhoyamaxa (n 104).

[221] Ibid, para 69.

[222] KICHWA INDIGENOUS PEOPLE OF SARAYAKU v. ECUADOR (Merits and Reparations) IACtHR Series C No 245 (27 June 2012).

[223] Ibid, para 133.

[224] World Bank OP 4.10 (n 52) para 2.

standards such as UNDRIP are not directly applicable to its activities nor enforceable within the framework of its policies and practices.[225]

Issues regarding development policy and poverty among indigenous peoples have also been raised within the context of the UN´s process to draft the recently adopted Sustainable Development Goals.[226] These issues reproduce those which must be tackled in order to understand the dimensions and implications of Articles 20, 21, 22, and 44 of UNDRIP. The UN's summit to adopt the post-2015 development agenda was held in September 2015. The SDGs take a more holistic approach to development than that of the Millennium Development Goals,[227] and make explicit reference to the particular vulnerability of indigenous peoples as a whole,[228] their vulnerability in food production and security,[229] and their gender disparities in education.[230]

The SDGs however make no explicit reference to UNDRIP or to the specific development priorities or needs of indigenous peoples, however, and a key group of UN experts has expressed concern that the SDG process excluded crucial dimensions of the interface between indigenous peoples and development.[231] From their perspective the SDG process should have taken into account both the additional burdens confronted by indigenous peoples living in longstanding conditions of poverty, and the potential contributions to sustainability grounded in their distinctiveness. The experts noted that 'Indigenous peoples face distinct development challenges, and fare worse in terms of social and economic development than

[225] See generally Human Rights Watch, *Abuse-Free Development: How the World Bank Should Safeguard Against Human Rights Violations* (HRW, July 2013) available at < https://www.hrw.org/report/2013/07/22/abuse-free-development/how-world-bank-should-safeguard-against-human-rights>, and 'The World Bank Should Champion Human Rights' New York Times, 27 June 2016, available at <http://www.nytimes.com/2016/06/27/opinion/the-world-bank-should-champion-human-rights.html?_r=0> (accessed Nov 28 2016).
[226] (n 1).
[227] (n 2).
[228] SDGs (n 1) para 23.
[229] Ibid Goal 2.3
[230] Ibid Goal 4.5.
[231] These experts represent the three principal mechanisms in the UN system specialising in issues involving the rights of indigenous peoples: the Special Rapporteur, the UN Permanent Forum on Indigenous Issues (UNPFII), and the Expert Mechanism created by the UN Human Rights Council in December 2007 in the wake of the adoption of UNDRIP. See UN OHCHR 'Indigenous Peoples cannot be "Deleted" from the New Global Development Goals, UN Experts Say' OHCHR News Release, Geneva/New York, (18 July 2014) available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14888&LangID=E (accessed Nov 28 2016).

non-indigenous sectors of the population in nearly all of the countries they live.'[232] But, they argued, 'they also can contribute significantly to achieving the objectives of sustainable development because of their traditional knowledge systems on natural resource management which have sustained some of the world's more intact ecosystems up to the present.'[233] They also emphasized that the SDGs 'present a unique opportunity to remedy these shortcomings and the historical injustices resulting from racism, discrimination and inequalities long suffered by indigenous peoples across the world.'[234] This directly echoes the language regarding development issues in paragraph 6 of UNDRIP´s Preamble.

The SDGs and the overall Post-2015 Development Agenda will be a test for assessing the extent to which UNDRIP is shaping indigenous policy concerns within the UN system and beyond. It is too early to tell how and whether indigenous concerns will become a reality through the post-2015 development agenda. The references to indigenous peoples in the SDGs remain limited, and the goals as a whole fall far short of an indigenous world-view of development, discussed in the section below.

iii New Approaches to Development: Indigenous World-View and Participation

As demonstrated above, approaches to development have ignored indigenous world views and excluded indigenous participation. However, new approaches to development are emerging, particularly in new constitutions in South America, but also in the policies of some of the international and regional development agencies. The UNDRIP itself contributes to the development of these new emerging norms, by insisting on indigenous self-determination of development, thus opening a space in the international legal discourse for indigenous worldviews to emerge and gain weight.

One fora where such worldviews are gaining credence is the African Commission. In 2010, in its *Endorois* decision, the Commission noted that the peoples concerned 'have not been accommodated by dominating development paradigms and in many cases they are being

[232] Ibid.
[233] Ibid.
[234] Ibid.

victimised by mainstream development policies and thinking and their basic human rights violated.'[235]

Meanwhile, the UNDP notes the 'fresh impetus'[236] for 'UNDP engagement with indigenous peoples'[237] resulting from the adoption of UNDRIP, recognizing that the 'international normative framework applying to indigenous peoples has been strengthened'[238] The UNDP specifically notes the emergence and broader relevance of alternative paradigms such as those summarized below in the context of Bolivia and Ecuador. Thus:

> Indigenous peoples from different parts of the world have been promoting a different concept of development that is multi-dimensional, holistic, cyclical, regenerative, and sustainable. A good example is the indigenous concept of "*Bien Vivir*" ("Living well") in Latin America, …. This is something that is being used more and more by governments (e.g., the Governments of Bolivia and Nicaragua), and may significantly contribute to the concept of human development for all, not only indigenous peoples.[239]

UNDG Guidelines on Indigenous Peoples' Issues of 2008[240] emphasize the connection between indigenous peoples´ right to development, rights to free, prior and informed consent (FPIC), and rights to self-determination and autonomy[241] and suggest the following framework for interpreting and implementing the right to development in the context of indigenous peoples:

> Indigenous peoples have the right to define and decide on their own development priorities. This means they have the right to participate in the formulation,

[235] Endorois (n 98)at para 148.
[236] UNDP, UNDP Response to the Questionairre on the Implementation of the Second International Decade of the Wold's Indigenous People, (UNDP, N.D) response to Question 2 available at http://www.un.org/esa/socdev/unpfii/documents/Second_%20Decade_%20Mid_Eva_Answers/UN%20agencies/United%20Nations%20Development%20Programme.pdf (accessed 28 Nov 2016).
[237] Ibid.
[238] Ibid.
[239] UNDP,'UNDP and Indigenous Peoples', cited in Pérez-Bustillo and Hernandez Mares (n 87) 143.

[240] UNDP, 'Guidelines on Indigenous Peoples' Issues' (UN, 2009) available at <http://www.un.org/esa/socdev/unpfii/documents/UNDG_guidelines_EN.pdf> (accessed 17 November 2016)
[241] Ibid, 8.

implementation and evaluation of plans and programmes for national and regional development that may affect them.[242]

This reflects closely Article 23 of UNDRIP. Importantly, the Guidelines note economic, social and cultural rights including the right to adequate housing and the need for protection from forced evictions, as issues of prime importance.[243] The Guidelines also note that women and children may be in need of special protection, which can best be assured by indigenous led development.[244] Also of relevance to this chapter is the fact that the Guidelines also specifically mention the necessary participation of women in decision making processes.[245]

The Recently adopted OAS Declaration on the Rights of Indigenous Peoples also reflects indigenous-driven views of development, rights to FPIC, and also rights to restitution, as lying behind any meaningful indigenous right to development.[246]

At the domestic level, several new constitutions recently adopted in South America have explicitly incorporated an indigenous world view. In Bolivia and Ecuador alternative indigenous concepts of development underpin the constitutional framework.[247] "*Sumak kawsay*" (in the variant of the prehispanic language of Quechua spoken in Ecuador), "*suma qamaña*" (in the variant of the prehispanic language of Aymara spoken in Bolivia), are translated into Spanish as "*vivir bien*" and into English as "living well" or "collective well-being'[248]. These concepts are deployed as bases for the 'refoundation' of these states and for the intended accompanying 'decolonization' of their constitutions and legal systems as a whole.[249] The insistence in the recently adopted constitutional frameworks in Bolivia and Ecuador on the need for alternative development paradigms rooted directly in indigenous traditions and the ethics and practices of contemporary indigenous social movements is convergent with the emphasis in UNDRIP (eg Article 23) on the right of indigenous peoples to determine and define their own priorities and strategies for development.

[242] Ibid, 15.
[243] Ibid 14.
[244] ibid
[245] Ibid.
[246] OAS Declaration, (n 7) Art XXIX.
[247] See further Pérez-Bustillo and Hernandez Mares (n 87) 141 – 142.
[248] Ibid.
[249] Ibid.

These concepts have been drawn from indigenous movements in these countries as part of their recovery of basic principles embedded in the civilisations prevailing in the Andean region prior to Hispanic colonial conquest in the 16th century,[250] and provide the overall normative framework for the approach taken in these constitutions to issues of state legitimacy, social policy and social development, human rights, as well as to indigenous rights in particular.[251] The indigenous social movements of Bolivia and Ecuador are among those which are most influential in Latin America as a whole,[252] and thus the impact of their success in obtaining constitutional recognition of their normative approach to indigenous policy issues is also likely to have widespread impact beyond these two countries, as evidenced above in their incorporation into UNDP´s processes of consultation and policy development and in the discourse of organisations such as the influential Society for International Development (SID).[253]

The Bolivian constitution, which is the most far-reaching thus far, includes a commitment in the Preamble to building a new kind of state based upon 'respect and equality for all' and principles such as 'sovereignty, dignity, complementarity, solidarity, harmony and equity in the distribution of social wealth'. Both the Ecuadorian and Bolivian constitutions, along with those of Venezuela and Colombia, are also notable for the extent to which they explicitly incorporate detailed aspects of international human rights law, including indigenous rights, and provide for their justiciability in national courts.[254] In most cases these references reflect the highest levels of protection or recognition existent in relevant international or regional instruments, and in others go further beyond the limits of current international minimums.[255] However, the existence of some States – such as Mexico– where the constitutional systems

[250] Ibid. See also Pérez-Bustillo (n 16) 58, and See generally Lander 'The discourse of civil society and current decolonisation struggles in South America' in Heine and Thakur (eds) *The Dark Side of Globalization* (UN UP 2010) and César Augusto Baldi, 'New Latin American Constitutionalism: Challenging Eurocentrism and Decolonizing History' (6 February 2012), http://criticallegalthinking.com/2012/02/06/new-latin-american-constitutionalism-challengingeurocentrism-decolonizing-history/ (accessed Jan 23 2017).
[251] Pérez-Bustillo (n 16) 58.
[252] Ibid.
[253] See for example, Walsh, 'Development as *Buen Vivir*: Institutional Arrangements and (De) Colonial Entanglements' (2010) 53(1) Development 15.
[254] Pérez-Bustillo (n 16) 59.
[255] Ibid.

fall disturbingly short of the minimum protection required in international law,[256] is evidence that indigenous perspectives on development have yet to be fully embraced by states.

The indigenous model of development was explicitly referred to by the IACtHR in the *Sarayaku* case,[257] where the representatives of the Sarayaku noted that the State had not taken the necessary and sufficient measures to ensure decent living conditions for all the members of the Sarayaku People, 'affecting their different way of life, their individual and collective life project and their development model'[258] which they argued constituted a violation of Article 4(1) of the American Convention.[259] This case clearly builds on the *Saramaka*[260] and *Awas Tingni*[261] cases, in which the IACtHR laid the groundwork for recognising an indigenous-driven world view, and the more holistic view of survival, development, and cultural identity now the norm in the cases before the Court. The IACtHR's jurisprudence, along with the African Commission's *Endorois*[262] case, have been termed 'earth jurisprudence' by some commentators.[263]

iv Conclusion on the Right to Development

While there may still be resistance to the right to development per se, as the negotiation of the UNDRIP itself revealed, the UNDRIP's provisions on development contribute importantly to the emergence of three trends in international law. The first is a growing willingness on the part of states to recognise a right to development for indigenous peoples, in part because of the inherent links between survival and indigenous driven development which are now being recognised in international law and which reflect the approach to the right to development in UNDRIP. The OAS Declaration reinforces this trend, at least with respect to the Americas. The second is increased attention to sustainable development in international law and international development policy. Attention to sustainable development principles both helps to protect indigenous peoples, but also creates space to introduce indigenous worldviews into

[256] Ibid. See further Pérez-Bustillo and Hernandez-Mares (n 87).
[257] (n 222).
[258] Ibid para 234.
[259] Ibid.
[260] (n 207).
[261] (n 217).
[262] (n 98).
[263] See Ratiba, '"Just Piles of Rocks to Developers But Places of Worship to Native Americans" – Exploring the Significance of Earth Jurisprudence for South African Cultural Communities' (2015) Potchefstroom Electronic Law Journal 18(1) 3197.

international law and policy, which has been the third major area in which UNDRIP contributes to the right to development.

III B Economic, Social and Cultural Rights

i Economic, Social and Cultural Rights: Inherent Links and Contextual Understandings

The primacy of the concept of survival in the UNDRIP suggests that the ESC rights addressed by Articles 21 and 22 must be understood as providing the material basis necessary to ensure that survival. This in turn acquires additional meaning when it is understood that indigenous peoples are confronted with at least three different kinds of threat to the survival which the Declaration is intended to ensure. First, physical survival in the face of material conditions of deprivation and discrimination; second, cultural survival as groups with distinct territories, cosmologies, traditions, identities, and institutions; and finally, survival understood as sustainability as peoples, which requires a combination of the first two dimensions and has particular relevance in circumstances where environmental devastation (for example due to mega-projects) and climate change undermine and ultimately erode or eliminate a peoples' ability to maintain and reproduce their identity in their traditional territories.

Article 21(1) frames the overall emphasis on ESC rights in the Articles discussed in this chapter in terms of indigenous peoples´ right to the '*improvement of their economic and social conditions*, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security'.

The rights to education, employment, vocational training and retraining, housing, sanitation, health and social security restate those rights indigenous individuals have in already existing international human rights standards, as discussed above in Part II. However, key to understanding Article 21(1) is the word *improvement*, which captures more than just the 'progressive realization' obligation of rights in current international human rights law. While the language in Article 21(1) and in 21(2) as to the 'improvement' of economic and social conditions is directly drawn from Article 11 of ICESCR's right to the 'continuous

improvement of living conditions,' UNDRIP gives greater concreteness by referring specifically to 'economic and social conditions' rather than the more generic reference to 'living conditions' in the ICESCR. The right to improvement of socio-economic conditions reflects the fact that indigenous peoples have long been discriminated against in these areas. In this way, Article 21(1) should be read as a prohibiting discrimination in these areas, and as requiring, as set out in Article 21(2), 'effective measures' and 'where appropriate, special measures' for indigenous peoples. Article 21 thus has both positive and negative elements.

Moreover, given the threefold notion of survival contained within the UNDRIP, economic and social rights of indigenous peoples should be seen not only as rights to basic goods and services, but as the underlying means to social flourishing as distinct peoples. They are thus, in the true sense of the word, economic, social and *cultural* rights. They also underpin the development rights discussed above.

It is clear that the major UN human rights treaty monitoring bodies are interpreting States' international obligations with due regard to indigenous peoples' particular socio-economic rights. For example, in its General Comment No 21 on the Right to take part in Cultural Life, the CESCR stated that human rights must be given effect in ways that are culturally appropriate. Specifically referencing indigenous peoples, the Committee noted that it had:

> in many instances referred to the notion of cultural appropriateness (or cultural acceptability or adequacy) in past general comments, in relation particularly to the rights to food, health, water, housing and education… The Committee wishes to stress in this regard the need to take into account, as far as possible, cultural values attached to, inter alia, food and food consumption, the use of water, the way health and education services are provided and the way housing is designed and constructed.[264]

The HRC reflects the cultural needs of indigenous peoples, and the inherent tie to subsistence means and therefore to economic social and cultural rights in cases such as *Angela Poma*

[264] CESCR Gen Com 21 (n 214) para 16(e).

Poma v Peru,[265] where it held that deprivation of water for grazing which supported the community's traditional subsistence agriculture breached Article 27 of the ICCPR.[266]

ii Specific Focus on the Right to Health as Economic, Social and Cultural Right

As part of UNDRIP´s overall framework as to the indigenous dimensions of ESC rights, Article 24 provides added emphasis on indigenous peoples´ right to health and other social services, already referenced explicitly in Article 21(1). This reflects health as a key determinant of social well-being.[267] But the Article also focuses importantly on the *cultural* dimensions of this right in paragraph 1, including the right to *traditional* medicines and health practices such as 'vital medicinal plants, animals and minerals'. Article 24 then makes a transition in the last clause of the first paragraph to a more generic formulation of indigenous peoples´ 'right to access, without discrimination, to all health and social services', and in 24(2) to the restatement within the context of UNDRIP of the same overall right to health which is set forth in Article 12 of the ICESCR, *in addition* to the special protections for traditional practices in Article 21(1).

It is clearly significant in interpreting the UNDRIP that the cultural dimensions of indigenous health rights are prioritized by being put in the first paragraph of Article 24, while the more general formulation of the right to health familiar from the context of Article 12 ICESCR is in the second. This logic, which puts the cultural dimensions first, is convergent with examples from domestic law. For example, the Bolivian government has been insistent on protecting (and restricting) the production and use of the Coca leaf for traditional health-related practices, as a medicinal plant, which would fall under the protection of Article 24(1)[268]. Interestingly, in the OAS Declaration provision on the right to health the order is

[265] *Poma Poma v Peru* CCPR/C/95/D/1457/2006 (27 March 2009).
[266] Ibid para 8.
[267] ILA interim report (n 12) 29.
[268] See: Angela Heitzeneder, 'The Coca-Leaf: Miracle Good or Social Menace: Cultural and Identity Rights of Andean Indigenous Peoples in International Law and in Context with the International Drug Conventions' (Vienna, 2010) at http://othes.univie.ac.at/12287/1/2010-11-04_0421153.pdf; Sven Pfeiffer, 'Rights of Indigenous Peoples and the International Drug Control Regime: The Case of Traditional Coca Leaf Chewing' (2013) 5 Goettingen Jounal of International Law 287; Ricardo Cortés, The Condemned Coca Leaf, New York Daily News (13 January 2013) at http://www.nydailynews.com/opinion/condemned-coca-leaf-article-1.1238569 (accessed Dec 6 2016). Ritual purposes are protected under UNDRIP Articles 31 and 34. See Xanthaki, Ch 10 of this volume.

reversed, premising the right in international law, though overall, the OAS Declaration maintains the strong focus of the UNDRIP on the importance of the right to health for indigenous peoples.[269]

Article 24 connects crucially to provisions on non-discrimination.[270] Article 24 implies that non-discrimination is a necessary but not sufficient condition for compliance with UNDRIP, which must be complemented by *both* 'effective' and, 'where appropriate', 'special' measures. States cannot claim that they are adequately addressing indigenous rights to health simply by offering the same services to indigenous peoples that are available to everyone; they must *also* shape and target the health services they provide to the specific health-related characteristics and needs of indigenous peoples, just as Article 14 of UNDRIP requires fulfillment of *both* of these dimensions (generality, 'effective' measures; and specificity, 'special' measures) in the context of state compliance with indigenous peoples´ right to education.[271]

Attention to the intertwined cultural, social and economic aspects of health rights of indigenous people have been given attention by the UN treaty monitoring bodies. For example, in a special Statement on the Rio +20 Conference on the Green Economy[272] the CESCR has noted that there are important linkages between biodiversity conservation, potential advances in pharmacology and medicine, and the enjoyment of indigenous peoples right to health, and to cultural knowledge.[273] Likewise, the Committee on the Rights of the Child has directly invoked Article 24 of the UNDRIP in its General Comment on the Rights of Indigenous Children,[274] noting that:

> Health-care workers and medical staff from indigenous communities play an important role by serving as a bridge between traditional medicine and conventional medical services and preference should be given to employment of local indigenous community workers. States parties should encourage the role of these workers by providing them with the necessary means and training in order to

[269] OAS Declaration (n 7) Art XVIII.
[270] See further Gover, Ch 7 of this volume.
[271] See Graham and Chavarro, Ch 13 of this volume.
[272] (n 216).
[273] Ibid para 6(f).
[274] (n 212).

enable that conventional medicine be used by indigenous communities in a way that is mindful of their culture and traditions.[275]

Social, cultural and economic development issues are, thus, all caught up in a right to health as expressed in Article 21(1) and (2). The order of ideas pursued in the drafting of Article 24 signals that UNDRIP´s intention is to ensure that state health policies for indigenous peoples respect and protect autonomous expressions of this right *and, at the same time,* ensure their overall access to the same health services which are provided to everyone. Full compliance with Article 24 thus requires due attention to both of these intertwined dimensions.

iii Conclusions on the UNDRIP and Economic, Social and Cultural Rights

UNDRIP, and particularly Articles 21 and 22 discussed in this chapter, strengthens human rights standards on economic, social and cultural rights in two main ways. First, the connection between economic, social and *cultural* rights is immediately obvious in the case of indigenous peoples, which requires a contextual and holistic understanding of economic and social goods as not merely basic needs but as the pre-conditions for cultural survival, development and flourishing. As such, the UNDRIP provides a platform to strengthen economic and social rights standards for all, by recapturing the often ignored, but more often crucial, cultural dimension of all socio-economic goods. Second, the UNDRIP advances the right to health specifically, and makes explicit the complementarity of health systems – both indigenous and state-driven – that are necessary for its enjoyment. By insisting on these contextual understandings of economic, social and cultural rights, the UNDRIP opens avenues for a richer understanding of these rights in international law.

III C The Rights of Indigenous People with Special Vulnerabilities

i Introduction: Protecting Vulnerable Groups in International Law and the UNDRIP

[275] Ibid para 52.

Articles 21(2), 22, and 44 are concerned with groups often marginalized or discriminated against within *already* marginalized communities. These groups – women, children and youth, older persons, and those with disabilities – are often particularly vulnerable. It is also important to note that the vulnerable are often additionally subject to intersecting forms of discrimination (as for example girl children or the elderly with disabilities), further increasing their vulnerability within a group. Articles 21(2), 22 and 44 therefore provide an important bulwark against an idealised interpretation of the UNDRIP that assumes that indigenous communities are homogenous in their needs and desires. However, the provisions seek to move beyond distinctions where, for example, women's or children's rights are posited as opposed to the rights of indigenous peoples as a whole. For example, rights of indigenous women are crucially constructive of other rights in the UNDRIP. As Val Napoleon has noted, for example, without the equality of aboriginal women, self-determination can only ever be achieved for half of an indigenous community.[276] It is, we note, questionable whether a half self-determined community can constitute a self-determined community at all.

Articles 21(2), 22 and 44 shed additional light both on UNDRIP´s approach to translating international human rights protections into the context of indigenous peoples, and to the complex balance between the need for states to take 'effective' and/or 'special' measures to ensure them. Articles 21(2) and 22(1) emphasize the need for 'particular attention' to the rights and needs of especially vulnerable groups such as 'indigenous elders, women, youth, children, and persons with disabilities'. The repetition between these two Articles as to the need to address the rights and needs of the groups which are enumerated is clearly significant in itself. The rights and needs of indigenous children are highlighted additionally in Article 22(2), which requires states 'to take measures, *in conjunction with indigenous peoples*, to ensure that *indigenous women and children* enjoy… *full protection and guarantees against all forms of violence and discrimination*' a right discussed in the section below.

These provisions are informed by, and are informing the further development of, human rights law at the international, regional and domestic level. For example, the CESCR has stated in General Comment 21 on the Right to take part in Cultural Life that women, children – and specifically indigenous children – older persons, and persons with disabilities require particular protection for their right to take part in cultural life.[277]

[276] Napoleon, 'Aboriginal Discourse: Gender, Identity, and Community' in Richardson, Imai, McNeil (n 79) 235.
[277] CESCR Gen Com 21 (n 214) Part E.

As noted above, the IACtHR has constructed a right to a dignified life or '*vida digna*.' Importantly, this right places positive obligations on the state in the case of individuals and communities in particularly vulnerable situations, which include indigenous peoples as a whole, but also children, pregnant women and the elderly.[278] In the *Sarayaku* case, the IACtHR set out the following test for determining whether the state had positive obligations for violating the right to life in a specific case. Positive obligations will arise when:

> at the time the events occurred, the authorities knew or should have known about the existence of a situation that posed an immediate and certain risk to the life of an individual or of a group of individuals, and that they did not take the necessary measures available to them that could be reasonably expected to prevent or avoid such risk[279]

and determined that the Sarayaku community had suffered equitable, 'non-pecuniary damages' that must be compensated, which were attributable to the effects on their 'health and safety' due to the unconsented oil exploration in their traditional territories which had been encouraged, facilitated, and subsidised by the State.[280]

In the *Sarayaku* case, the Community argued that, during the period of food shortages and state of emergency, there were case of illnesses that mainly affected children and the elderly, a situation described as 'fatal to the health of Sarayaku members who were prevented from having access to health care centers,' which affected their right to life.[281] The Court makes specific reference to the effects of the situation on indigenous elderly persons, as contemplated under UNDRIP Articles 21(2) and 22.[282]

ii *Women*

Special protections for indigenous women are emphasised both in Articles 21(2), and in 22(1) and (2), but also in a separate provision, Article 44, which affirms that 'All the rights and

[278] See above text accompanying fn 117.
[279] Sarayaku (n 222) para 245.
[280] Ibid para 58.
[281] Ibid para 67.
[282] Ibid.

freedoms recognized herein are equally guaranteed to male and female indigenous individuals'. Article 44 was one of the least controversial of all articles in the UNDRIP, and undoubtedly reflects existing international prohibitions on gender discrimination.

UNDRIP's provisions on women's rights seek to overcome the perception of women's rights as opposed to indigenous rights. Conventional interpretations are based on compartmentalisation, hierarchy and distinction, while indigenous women conceive of women's human rights and collective rights 'as two parts of a coherent whole'.[283] This difference should be understood as an opportunity for a 'vibrant engagement, strengthening an intercultural, gendered understanding and application of human rights that both promotes the rights of indigenous women and enhances the human rights framework itself.'[284]

Recent policy analysis and scholarship within the UN system seeks to address these complexities beyond the universalist/relativist frame that is traditionally applied to such issues, and provides important additional guidance for interpreting and assessing the implications of Articles 21, 22 and 44 of UNDRIP, in an understanding of women's rights and indigenous rights as 'inextricably linked'.[285]

According to the UN's Office of the Special Adviser on Gender Issues and Advancement of Women and the Secretariat of the UNPFII, 'indigenous women seek to find points of alignment between international human rights instruments and local values and practices that uphold women's rights, thus promoting both gender equality and cultural identity as two crucial bases for the full enjoyment of human rights.'[286]

While the starting point should be clearly understood as that all indigenous women enjoy the human rights and equality due to women everywhere, as Article 44 clearly states, Articles 21 and 22 provide opportunities to think of the relationship between women's human rights and the indigenous rights of a group in more collaborative and interdependent ways than has

[283] UN Office of the Special Adviser on Gender Issues and Advancement of Women and the Secretariat of the UNPFII 'Gender and Indigenous Peoples' Human Rights: Briefing Note 6' (New York, February 2010), 1 available at http://www.un.org/esa/socdev/unpfii/documents/BriefingNote6_GREY.pdf (accessed Dec 6 2016).
[284] Ibid.
[285] See Ibid and UNICEF et al, *Breaking the Silence on Violence against Indigenous Girls, Adolescents and Young Women: A call to action based on an overview of existing evidence from Africa, Asia Pacific and Latin America* (UNICEF, May 2013), available at http://www.unfpa.org/public/home/publications/pid/14405 (accessed Dec 6 2016).
[286] Briefing Note 6 (n283) 2.

previously been the case, and as such provide an important impetus for moving the human rights of all women forward both practically and conceptually.

iii Children and Youth

International law seeks to protect indigenous children as particularly vulnerable members within their own communities and to recognize their particular vulnerabilities to activities taking place over their communities as a whole.

The UN Committee on the Rights of the Child (CRC) has made a major contribution to the development of the rights of the child in line with the UNDRIP, with General Comment No 11 in 2009 specifically on Indigenous Children and their Rights under the Convention, which makes explicit reference to the rights of the indigenous child under the UNDRIP.[287] In addition, CRC General Comment No. 16 on State Obligations regarding the impacts of the business sector on human rights notes that Indigenous children's rights under the CROC on the right to life, survival and development (Article 6) are particularly at risk where their land is sold or leased to investors, leading to the deprivation of access to natural resources, subsistence and cultural heritage.[288] The CRC further notes that indigenous children may have particular difficulty in making themselves heard, a right under Article 12 of the CROC.[289] The CRC has thus taken the lead in fleshing out the interpretation of the rights of children under the UNDRIP, taking a contextual and holistic approach that demonstrates the inherent links between the enjoyment of children's rights and their ability to enjoy their traditional cultures, in community with their peoples, on their traditional lands. The IACtHR, by recognizing children and indigenous peoples as specifically vulnerable, has also made a contribution to furthering their protection in international human rights law though the concept of the 'vida digna' discussed above.[290]

While the CRC considers all those under the age of 18 as children, indigenous youth have received specific additional attention. A 2013 report of the international expert group

[287] CRC, Gen Com 11 (n 212).
[288] UNCRC, General Comment No. 16 (2013) *'State Obligations Regarding the Impact of the Business Sector on Children's Rights'* CRC/C/GC/16 (17 April 2013) para 19.
[289] See also UNCRC, General Comment No. 12 (2009) *The right of the child to be heard*, CRC/C/GC/12 (1 July 2009) para 21, 87.
[290] Text accompanying fn 117, fn 278.

meeting on indigenous youth[291] specifically considered the meaning of Article 21 of the UNDRIP in this regard.[292] It recognized enormous challenges facing indigenous youth from urbanization, gang activity, and militarization, to sexual health, malnourishment and homelessness.[293] The report stressed the need for indigenous youths' right to identity to overcome deracination and colonial dispossession,[294] and stressed the need for indigenous youth to enjoy rights to participation, inter-cultural education, language rights, and access to justice and social services for example.[295] The report highlights the multiple issues that face indigenous youth, not all of which equally face indigenous children of younger ages, and which justify the inclusion of youth as a particularly vulnerable category of persons in the UNDRIP.

iv Older Persons

UNDRIP is the only major international human rights instrument that highlights a concern for the rights of elders as an especially vulnerable or protected group in its text, and the Declaration´s recognition of this in Articles 21(2) and 22(1) may in fact play a role in helping lay the foundation for the eventual emergence of a specific instrument focused on the rights of elders within the UN system. It is widely recognized that elders play a special role in indigenous and tribal societies as leaders and/or as custodians or sources of spiritual guidance, traditional knowledge, and wisdom,[296] and it may be that indigenous peoples´ contribution to the wider recognition of their dignity and worth may make a similar kind of contribution in this context, to the role that indigenous notions as to the defence of Mother Earth as a living organism have made to environmentalist movements and to the concept of sustainable development, as discussed above. The OAS Declaration, however, makes only one mention of elders or older persons, in Art XXVII on Labor Rights, which obliges states

[291] UNPFII, Indigenous Youth: Identity, Challenges and Hope: Articles 14, 17, 21 and 25 of the UNDRIP, Report of the international Expert Group Meeting E/C.19/2013/3 (12 March 2013).
[292] Ibid, para 1.
[293] Ibid para 11.
[294] Ibid.
[295] Ibid para 44 – 63.
[296] See for eg Holmes 'Heart Knowledge, Blood Memory, and the Voice of the Land: Implications of Research among Hawaiian Elders' in Sefa Dei, Hall and Goldin Rosenberg (eds) *Indigenous Knowledges in Global Contexts: Multiple Readings of Our World* (2000 U of T press) and Nathani Wane 'Indigenous Knowledge: Lessons from the Elders – A Kenyan Case Study' ibid.

to take immediate and effective measures to eliminate exploitative labour practices, with specific mention of children, women and elders.[297]

Guidance as to issues related to the special vulnerabilities of indigenous elders may also be obtained from CEDAW General Recommendation 27, which focuses on issues relating to the rights and needs of older women and the protection of their human rights.[298] There is also a CEDAW General Recommendation 18 (1991) regarding issues involving women with disabilities.[299]

v Persons with Disabilities

In a 2014 Report the UNPFII notes that in some indigenous cultures, there is no equivalent translation of the term 'persons with disabilities.'[300] As such, attitudes to, and understandings of, disability may differ substantially within and across indigenous societies. Accordingly, the report stresses that the UNDRIP and the UN Convention on the Rights of Persons with Disabilities (CRPD) must be read together to give a culturally sensitive meaning to the protection of indigenous peoples with disabilities.[301]

Indigenous persons with disabilities are entitled to all rights included in the CRPD, nevertheless, despite the closeness in time between the adoption of the UNDRIP and the CRPD, there has until recently been little attention to the rights of indigenous peoples with disabilities.[302] In fact, the UNPFII has noted that indigenous people with disabilities remain in effect 'invisible' in UN discussions and work on indigenous peoples.[303] Symptomatically, perhaps, the CRPD includes only one reference to indigenous peoples, in its Preamble,

[297] OAS Declaration (n 7) XXVII (2).
[298] UNCEDAW, General recommendation No. 27 on older women and protection of their human rights' (2010) CEDAW/C/2010/47/GC.1 (19 October 2010).
[299] CEDAW, 'General recommendation No. 18: Disabled women' (1991) A/46/38.
[300] UNPFII, *Study on the Situation of Indigenous Persons with Disabilities, with a particular focus on the challenges faced with regard to full enjoyment of human rights and inclusion in development* E/c.19/2013/6 (5 February 2013) Para 19.
[301] Ibid para 10-11.
[302] See ibid and UN IASG on Indigenous Peoples' Issues, 'Rights of Indigenous Peoples/Persons with Disabilities: Thematic Paper towards the Preparation of the 2014 World Conference on Indigenous Peoples' available at http://www.un.org/en/ga/president/68/pdf/wcip/IASG%20Thematic%20Paper_Disabilities.pdf at p. 2 – 4 (accessed Jan 24 2017).
[303] UNPFII 'Indigenous Peoples with Disabilities' (n 300) para 16.

despite evidence that in some countries, indigenous peoples are living with disabilities in far greater proportions than the general population.[304]

The UNPFII study on the situation of indigenous persons with disabilities identified the major issues facing indigenous peoples with disabilities as including: self-determination; participation in decision-making and consultation; access to justice; rights to education, language and culture; access to health; enjoyment of an adequate standard of living; and the ability to live in the community.[305] Multiple or double discrimination is also explicitly acknowledged here, demonstrating the difficulty of separating out categories of vulnerability conceptually and in practice.[306] Indigenous children are mentioned, particularly in identifying that their special needs often result in their removal from the community,[307] an action that can infringe Art 7(2) of the UNDRIP which prevents any forced removal of children from an indigenous community, and which represents customary international law.[308] Indigenous women with disabilities are also noted, particularly in connection to their higher risk of experiencing violence than those without disabilities.[309] The report stresses that the UNDRIP is a major legal framework for protecting the rights of indigenous peoples with disabilities, and that other international human rights standards, notably the CRPD, must be read in light of it.[310]

It is clear that the international legal standards on indigenous peoples with disabilities are nascent in character. However, it appears that the UNDRIP as a whole, and Articles 21 and 22 in particular, will be important guides in any developing law.

Vi Conclusions on Indigenous Persons in Situations of Particular Vulnerability

The multiple and often overlapping and intersecting vulnerabilities of indigenous children, youth, women, older persons and persons with disabilities is clear from the UN Reports and

[304] Ibid para 1 – 8.
[305] Ibid.
[306] Ibid para 29 – 30.
[307] Ibid para 46.
[308] See further Hohmann, Ch 6 of this volume.
[309] UNPFII 'Indigenous Peoples with Disabilities' (n 300) para 49. See further UNHRC, Thematic Study on the Issue of Violence against Women and Girls and Disability' A/HRC/20/5 (30 March 2012). See also discussion below III D.
[310] Ibid (n 300) para 9 – 14.

initiatives in this area. These facts, and the sometimes only recent, and overall to date insufficient, attention to their redress, mean that the UNDRIP provisions here are sorely needed. In the best interpretation, Articles 21, 22 and 44 will be used to provide special measures and sweeping policy changes that will overcome systemic discrimination and marginalisation. To date, however, the legal efforts in this area remain nascent and limited in overcoming histories of dispossession, colonialism, and social breakdown that have exacerbated the violations experienced by the most vulnerable.

III D Prohibition of violence against women and children.

i The Context of Violence and Discrimination Experienced by Indigenous Women and Children

In recent years, a number of high-profile reports of endemic abuse of women and children in indigenous communities have focussed international attention on the need for prohibition of violence for women and children in these communities. For example, a 2007 report into high levels of child abuse in Australia's Northern Territory Aboriginal communities led to a controversial national government 'intervention.'[311] Recently a CEDAW enquiry into the murder and disappearance of Aboriginal women in Canada found that an Aboriginal woman between the ages of 25 – 44 in Canada is five times more likely to die as a result of violence than a non-indigenous woman.[312] Even Mexico's former attorney General Arely Gomez (the first woman to occupy the position) has recently acknowledged that according to government data, which most advocates consider to be a vast under-estimate, indigenous women in that country confront twice as much risk of being victimized as non-indigenous women, and similar patterns have been documented in Guatemala.[313]

A 2013 joint report issued by amongst others, UNICEF, the UNFPA, and UNWomen, provides guidance as to the actual scale, diversity, and complexity of violence against

[311] Wild and Anderson, *Report of the NT Board of Inquiry into the Protection of Aboriginal Children from Child Abuse, Make Akelyernemane Meke Mekarle: Little Children are Sacred* (2007) (Australia).
[312] CEDAW, 'Report of the Inquiry concerning Canada' CEDAW/C/OP.8/CAN/1 para 95.
[313] 'Top Officials take on Violence against Indigenous Women and Girls in North America' at http://www.indianz.com/News/2016/10/17/top-officials-take-on-violence-against-i.asp, (accessed 6 Dec 2016) and Beltrán and Freeman, 'Hidden in Plain Sight: Violence Against Women in Mexico and Guatemala' (March 2007, Washington Office on Latin America).

indigenous and tribal women that Article 22(2) is focused on.[314] Overall the report finds that violence against indigenous women 'must be understood within the broader contexts of indigenous peoples' historic and continuing marginalization and discrimination, violations of their collective and individual rights, displacement, extreme poverty and often-limited access to culturally appropriate basic services and justice'[315]

The UNICEF report emphasises the multi-dimensional character of such violence:

> Its dimensions include physical, sexual and psychological/emotional violence in the family and community, as well as such violence perpetrated or condoned by the State. Specific forms and manifestations include domestic violence, child marriage, forced pregnancy, honour crimes, FGM/C, femicide, non-partner sexual violence and exploitation, sexual harassment, trafficking and violence in conflict situations.[316]

Indigenous women and children experience high levels of violence and abuse from both *inside* and *outside* their own communities,[317] resulting from their marginalization and poverty within greater society, and from individual and systemic discrimination by perpetrators and by those supposed to protect these vulnerable groups, such as the police and law makers.[318]

Indigenous peoples in general are highly vulnerable to serious human rights violations, particularly those related to struggles for hegemony over their territories, resources, and traditional forms of knowledge, practices, and relationship to nature.[319] Indigenous women are often targeted for some of the most violent abuses, including femicide, rape, and other forms of sexual and gender violence and abuse, which arise precisely because women play such an important role in many indigenous cultures in terms of the reproduction of their cultures, languages, knowledge, and practices through child-bearing, child-rearing, education,

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[314] UNICEF et al, *Breaking the Silence on Violence against Indigenous Girls, Adolescents and Young Women*, (UNICEF, May 2013).
[315] Ibid iv.
[316] Ibid 3, See also UNHRC, *Thematic Study on the Issue of Violence against Women* (n 309) para 18.
[317] CEDAW, Report on Canada (n 312) para 96.
[318] Ibid paras 132 – 180 for the litany of failings in Canada's law enforcement response to missing and murdered Aboriginal women.
[319] See Anup Shah, 'Rights of indigenous people — global issues' (16 October 2010) at http://www.globalissues.org/article/693/rights-of-indigenous-people> (accessed 17 November 2016).

and in cultural and spiritual leadership roles.[320] Under such circumstances, women may be singled out for sexual and other forms of violence that involve convergent modes of femicide and genocide as a way to intimidate and silence their communities, and even as part of an effort to annihilate them and movements in defence of their rights, as distinct communities or sectors.[321] At the same time it is often indigenous women who play active leadership roles or who are perceived as potential leaders who are singled out for sexual or other forms of violence within the context of efforts to repress such movements.[322]

It is precisely, however, in contexts such as Bolivia and Mexico´s indigenous Zapatista movement where important advances in the construction of alternative public policies at the national and local levels which deepen the recognition of indigenous rights have at the same time produced the most notable successes in addressing the rights of indigenous women, and in generating their participation and leadership in such processes.[323]

Issues of gender equality and discrimination against women pose difficult challenges in many indigenous and tribal communities, often because of the disproportionate impact on women and girls of colonial legacies and neo-colonial, neoliberal policies, and the ways in which such legacies and effects often become intertwined with essentialist, frozen conceptions of "tradition".[324] As a result, indigenous and tribal cultures are often stereotyped as fostering the unequal treatment of women, including engrained patterns of domestic violence and sexual abuse, as if they reflected inherent cultural traits attributable to indigenous identity.[325] At the same time many practices that may in fact under certain circumstances promote such

[320] Centro de Derechos de la Mujer de Chiapas, A.C. (CDMCH), Grupo de Mujeres de San Cristóbal de Las Casas A.C. (COLEM) 'Shadow Report to the CEDAW: Mexico: Discrimination and Lack of Access to Justice for Women in the Chiapas, Mexico' (San Cristóbal de Las Casas, May 2012) available at http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/CDMCH_COLEM_for_the_session_en.pdf (accessed 6 Dec 2016).

[321] See for example the context of the 1997 Acteal Massacre in the Mexican region of Chiapas, where 36 of the 45 victims were indigenous women and girls who had been forcibly displaced from their home communities, targeted by government-backed paramilitary forces because they were accused of allegiance to the Zapatista rebels, ibid 16 – 29.

[322] Ibid.

[323] See Rouseau 'Indigenous and Feminist Movements at the Constituent Assembly in Bolivia: Locating the Representation of Indigenous Women' (2011) 46 Latin American Research Review 5 (Bolivia) and Hernández Castillo, 'Zapatismo and the Emergence of Indigenous Feminism' (2002) XXXV No 6 Report on Race and Identity 39 (Chiapas).

[324] See generally IWGIA, Gender and Indigenous Women: Position Paper and Strategy (1999 IWGIA) available at http://www.iwgia.org/images/stories/sections/about-iwgia/documents/strategy-papers/Genderstrategy.pdf (accessed 6 Dec 2016) at 9; for a critical analysis of the interaction between tradition and sexism, see Napoleon (n 276) 234 – 36.

[325] IWGIA, ibid.

inequalities cloak themselves in the supposed legitimacy of "tradition," and promote resistance to efforts towards greater equality for women by associating such initiatives with invasive, pro-Western agendas.[326] Such approaches easily fall into the trap of framing the rights of women, including those of indigenous women, in opposition to, or in destructive, zero-sum, tension with, the collective rights of indigenous peoples. Articles 21, 22, and 44 of UNDRIP instead insist upon an understanding of individual indigenous rights and the rights of indigenous peoples as inherently intertwined. As a recent UN Report directed by indigenous experts put it, 'in all societies there are practices to keep, practices to change and practices to reconsider. While indigenous peoples continue to value and perpetuate their culture and way of life, we should not be exempt from this type of reflection.'[327]

As such, the prefatory reference in Article 22(2) to the requirement that states take compliance measures to protect indigenous women and children against violence and discrimination 'in conjunction with indigenous peoples' is significant. This language at minimum conveys a double-edged approach to the issue of violence against indigenous women and children. On the one hand, the insistence on joint action between the state and indigenous peoples in this context strongly suggests a framework of complementary obligations and duties which apply both to the state *and* to indigenous communities in their systems of autonomy and self-government. This underlines the importance UNDRIP attributes to the protection of indigenous women and children from violence as an imperative and priority for indigenous authorities. At the same time the emphasis on joint, convergent action suggests that unilateral action by states in the absence of such cooperation should be avoided. This seeks to respond to the long history of abuses by states, evidenced in concerted interventions into the family life of indigenous and tribal peoples in contexts such as the "stolen generations" of forcibly removed aboriginal children in Australia[328] and that of Native American boarding schools in the US and Canada.[329] The Australian Federal Government's response to child abuse in the Northern Territories has been criticized also in this respect. A suite of racially discriminatory law reforms that implicated all aspects of daily life in the

[326] Ibid.
[327] UNICEF (n 314) at iv.
[328] See: Human Rights and Equal Opportunity Commission, 'Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families' (HREOC, 1997);
[329] Smith, 'Soul Wound: The Legacy of Native American Schools' *Amnesty International Magazine* (March 26 2007) at http://www.amnestyusa.org/node/87342 (accessed 6 Dec 2017) (USA); TRC 'Honouring the Truth, Reconciling the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada (TRC Canada, 2015); TRC: Truth and Reconciliation Commission of Canada, 'Canada, Aboriginal Peoples and Residential Schools: They Came for the Children' [2012].

communities was imposed without consultation,[330] indicating the distance states still need to travel in fulfilling the aims and standards of the UNDRIP.

UNICEF's 2013 Report[331] provides important conceptual guidance for navigating the complexities of the intersectionality emphasized in Articles 21(2) and 22 of UNDRIP, as well as regarding the challenges of applying the emphasis on sexual and gender equality affirmed in Article 44 within the context of indigenous peoples and communities. The Report´s recommendations include calls for the collection of empirical evidence to address the 'statistical silence' around violence against indigenous girls and women, which is a worldwide problem, but particularly acute in the African region; the need to address the structural, underlying risk factors that lead to violence against indigenous women and children, which include poverty, discrimination, and the very lack of adequate social and economic conditions these provisions of UNDRIP seek to redress; measures to tackle impunity for perpetrators, and to promote values and practices within indigenous communities that serve as protective factors, and for adequate redress and enforcement of laws; improvements in social welfare services so that front-line support is available, accessible, appropriately resourced, and age, gender and culturally appropriate.[332] Calls for more resource and coordination in policy implementation are also important.[333]

The CEDAW Enquiry into missing and murdered Aboriginal Women in Canada mirrors these calls, stressing the need for both equal treatment by state actors and law enforcement agents, as well as the underlying need to overcome stereotypes and redress historical injustices and the legacies of colonialism.[334] All of these factors must be taken into account as part of a comprehensive approach to securing and monitoring the implementation and enforcement of Articles 21, 22, and 44.

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[330] See Cowan, 'UNDRIP and the Intervention: Indigenous Self-Determination, Participation, and Racial Discrimination in the Northern Territory of Australia' (2013) 22(2) Pacific Rim Law and Policy Journal 247, 250 – 52; Little Children Are Sacred (n 311).
[331] UNICEF, (n 314).
[332] Ibid.
[333] Ibid.
[334] CEDAW, Report on Canada (n 312) Part X (recommendations).

Discrimination against women and girls contravenes the existing corpus of international law. However, it is clear that more specific responses are needed to address the structural violence that underlies personal, individual, experiences of violence by indigenous women and girls.
In this respect the Inter-American Court of Human Rights has decided a series of important cases which seek to respond to violence against women and girls. Two cases decided in 2010 by the Court have interpreted the implications of the Belém do Pará Convention, the *Case of Rosendo-Cantú et al v. Mexico*[335] and the *Case of Fernández Ortega et al v. Mexico*.[336] The two cases involved indigenous women from the Mexican region of Guerrero who were victims of rape in two different incidents involving military personnel engaged in operations combining counter-insurgency efforts with US-backed anti-drug campaigns (in this instance intended to promote the eradication of the cultivation of poppies, coca, and/or marijuana).[337]

The cases were litigated before UNDRIP was adopted and so UNDRIP is not cited or explicitly interpreted by the Court. But the Court´s interpretations of the complex inter-relationship between relevant provisions of CEDAW, the CROC, the Convention of Belém do Pará, and the Inter-American Convention to Prevent and Punish Torture,[338] and other dimensions of international and Inter-American law in the context of sexual violence against indigenous women and young girls, provides important guidance for the interpretation of the meaning and reach of Articles 21, 22, and 44 in UNDRIP.

In both cases the IACtHR found the Mexican state responsible for multiple violations of the Inter-American Convention on Human Rights as well as the Belém do Pará convention and the Inter-American Convention to Prevent and Punish Torture, ruling among other things that the rapes committed in both cases amounted to a form of torture because of the circumstances under which they were committed.[339] The Court also described the intertwined vulnerabilities of each of the women involved because of their dual and convergent status as indigenous

[335] *Case of Rosendo-Cantú et al v. Mexico* (Preliminary Objection, Merits, Reparations, and Costs). IACtHR Series C No 216 (31 August 2010).
[336] *Case of Fernández Ortega et al v. Mexico* (Preliminary Objection, Merits, Reparations, and Costs). IACtHR Series C No. 215 (30 August 2010).
[337] See Pérez-Bustillo and Hernandez Mares (n 87) 246 – 252.
[338] (adopted 9 December 1985, entered into force 28 February 1987) OAS Treaty Series No 67, reprinted in OEA/Ser.L/V/82 Doc 6 Rev 1 at 83.
[339] Roseno-Cantu (n 335) para 87, see also para 20 – 25; Fernandez Ortega (n 336) para 40, 24 – 29.

women,[340] which was further exacerbated in terms of an added vulnerability in the case of Rosendo Cantú because she was a minor at the time the rape was committed.[341]

The Court highlighted Rosendo Cantu´s vulnerability as an indigenous woman based on her language and identity,[342] as it also did in the Fernández Ortega decision,[343] and also relied in Rosendo Cantu on two General Comments of the Committee on the Rights of the Child[344] and on Article 19 of the American Convention, to affirm Rosendo Cantu´s right as a "girl" to special protection.[345] The Court also noted how the Mexican judicial process regarding cases of rape involving indigenous women denied her right of access to the judicial system as well as her right as a child (at the time) to be heard.[346]

In the Rosendo Cantu case, the Court also emphasised expert witnesses testimony from former UN Special Rapporteur Rodolfo Stavenhagen and psychologist Clemencia Correa that indigenous women in rural regions of Mexico confront extreme degrees of vulnerability to the presence of military personnel in their communities due to 'institutional violence by the military':[347] The Court accepted that 'indigenous women continue to suffer consequences from patriarchal structures blind to gender equity particularly within institutions such as the Armed Forces and police whose members are trained to defend the Nation and to combat or attack criminals, but who are not sensitized to the human rights of the communities or of women.'[348] In both cases the Court ordered a series of what it characterized as collective measures of multicultural, multilingual reparation including the publication of the Court´s judgment in newspapers in the indigenous language (Me´paa) spoken by both women, and special measures in terms of education and training in both Spanish and Me´paa to help prevent rampant sexual violence against indigenous women[349]

[340] Fernandez Ortega (n 336) para 73, 81; Rosendo-Cantu (n 335) para 103, 245.
[341] Rosendo-Cantú (n 335) para 103, 245.
[342] Ibid 185.
[343] Fernandez Ortega (n 336) para 223.
[344] Rosendo Cantu (n 335) para 202, referencing UNCRC *General Comment 5 General measures of implementation for the Convention on the Rights of the Child (Articles 4 and 42 and paragraph 6 of Article 44)*, CRC/GC/2003/5 (November 27, 2003) and UNCRC General Comment 12 (n 289).
[345] Rosendo Cantu (n 335) para 202.
[346] Ibid para 201.
[347] Ibid para 70 – 71.
[348] Ibid para 71.
[349] Fernandez Ortega (n 336) paras 223, 243, 247; Rosendo Cantu (n 335) paras 225, 226, 228, 229.

The Recently adopted OAS Declaration on the Rights of Indigenous Peoples includes Article VII(2) which recognizes 'that violence against indigenous peoples and persons, particularly women, hinders or nullifies the enjoyment of all human rights and fundamental freedoms'. States, meanwhile, must 'adopt the necessary measures, in conjunction with indigenous peoples, to prevent and eradicate all forms of violence and discrimination, particularly against indigenous women and children.' (in Article VII(3)) and in Art XXX on the right to peace, security, and protection, notes that states 'shall take special and effective measures in collaboration with indigenous peoples to guarantee that indigenous women, children, live free from all forms of violence, especially sexual violence, and shall guarantee the right to access to justice, protection, and effective reparation for damages incurred to the victims.' Article XXX in particular reflects the fact that indigenous women are often subjected to violence in times of conflict and unrest, which is especially relevant in contexts such as Colombia and Mexico.

These cases and the developments at the OAS are welcome, but the embrace of UNDRIP by other UN actors, such as the Special Rapporteur on Violence Against Women and the CEDAW Committee, as well as domestic governments, their military and police forces, are also necessary given both the overwhelming evidence of the violence experienced by indigenous women, and the intersectional and multiple nature of the discrimination they face.

III E Special Measures

The references in UNDRIP Articles 21(2), 22, and 44 to the particularised vulnerabilities of specific groups and to the need for preferential measures along the lines of affirmative or positive action or positive discrimination are key. From this perspective, the issue of special measures and their appropriate character includes the emphasis in Article 22 on the 'rights and special needs' of the same sectors specified in 21(2), and underlines the importance of focusing on the same especially vulnerable groups highlighted in 21(2). Article 22(2) in turn stresses the need for the 'full protection' of such groups against all forms of violence and discrimination (including upon the basis of gender as emphasised by Article 44).

Special measures are discussed in detail by Kirsty Gover in Chapter 7 of this volume. It is clearly the case that UNDRIP reflects existing international law, which accepts state obligations for special measures to redress the effects of discrimination and to overcome disadvantage and marginalization. However, as Gover notes, questions remain. For example, it is unclear whether special measures for indigenous peoples under the UNDRIP are confined to those groups mentioned in Article 22, or whether they encompass indigenous people and peoples on a broader basis. In line with an organic understanding of vulnerability and of state obligations under international human rights law, it is better to see the UNDRIP's inclusion of special measures as open to redress vulnerabilities more broadly. However, States may resist this understanding as they resisted the inclusion of special measures during the negotiations, as detailed in Part II. The OAS Declaration, positively, uses the phrase special measures with respect to women and children (in Article XXX 4(c)), but extends special measures to all indigenous people under Article XXVII(1) on labor rights, which states that '… states shall take all special measures to prevent, punish and remedy the discrimination to which indigenous peoples and persons are subjected.'

A second question concerns the character of special measures. For example, 'interventions' such as Australia's response to child abuse in the Northern Territories[350] and its discriminatory imposition of alcohol restrictions over the Palm Island Community[351] were imposed without consultation and should be seen as lacking when measured against the needs for participation and indigenous-driven self-determination in the UNDRIP, even, or perhaps particularly in the case of redressing violence against the vulnerable, as true solutions must involve the whole community.

The status and scope of special measures under the UNDRIP, and its contribution to more general law in this area, remains to be seen, but the reader should refer to Chapter 7 in this volume to assess the state of the law at the time of writing.

Part IV Conclusion

[350] See above, n 330.
[351] See further Gover in this volume.

The UNDRIP symbolises the potential emergence of a historic new pact between indigenous peoples and the international system which reflects important hopes and aspirations, but also confronts multiple barriers to effective implementation which are inherent in the origins, characteristics, structures, and contradictions of that system itself. This goes to the heart of the complex chemistry between the Declaration and other international norms and structures within which it is necessarily embedded. On the one hand the Declaration must be understood and interpreted within the context, and against the backdrop, of the overall contemporary international system, but on the other hand, several of its provisions conflict with, or fit at best uneasily, with longstanding assumptions and practices which are characteristic of that system. Multiple complexities arise here which must be navigated.

The provisions analysed in this chapter reflect this tension. Some aspects of Articles 20, 21, 24 and 44 reflect a clear consensus in existing international law. The equality of men and women in Article 44 is a case in point. It is also uncontroversial that indigenous peoples enjoy socio economic rights as all other individuals. These conclusions should be so obvious that they do not need stating, but the UNDRIP was in part fought for because they had not proved self-evident in many political contexts. More radically, there is also now strong support for an inherent connection between the socio economic and cultural rights of indigenous peoples, which recognizes inherent connections to traditional land and territory as the basis not only for individual survival, but cultural survival, development and flourishing.
The IACtHR's key cases on indigenous rights together constitute the most advanced interpretations of indigenous rights issues in the world. The African Commission has also made important strides in this direction. In addition, as this chapter shows, some of these approaches have been specifically incorporated into the work of UN and other inter-national agencies and international financial institutions such as the UNDP, the Inter-American Development Bank, and the World Bank. Many parallel developments that accord with the UNDRIP are also in evidence, even when they do not directly reference it, for example the work of CEDAW on violence against indigenous women.[352]

Nevertheless, the negotiating history of the provisions considered here demonstrates that some of the core issues addressed in these Articles remain contested. The right to

[352] CEDAW, Report on Canada, (n 312).

development itself, let alone a vision of development in harmony with indigenous worldviews, remains controversial and resisted by states.

It is likely that the provisions addressed in this chapter will remain central for indigenous individuals and peoples in the coming decades. Accordingly, it is likely that some of the areas now nascent – such as the law on indigenous peoples with special vulnerabilities - will experience considerable development over time. Social movements grounded in indigenous communities will play a crucial role in the further development and implementation of existing international legal standards regarding their rights, and in their deepening in terms of indigenous worldviews and demands.

It can only be hoped that indigenous peoples will achieve self-determined development, adequate standards of living, and cease to be vulnerable, such that these rights become unimportant. That would be the true success of the UNDRIP in this area.